Supreme Court, U.S.
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No. 99 ___

IN THE

Supreme Court of the United States

WATERVIEW MANAGEMENT COMPANY,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Were Appellant's Constitutional rights to due process and trial by jury violated when the lower court ruled, without a hearing, that damages could not be recovered for the remainder of its property where the RTC had taken a part, and then the Circuit Court affirmed on an entirely different basis that had not been raised in the lower court; thus contradicting a holding in the Fifth Circuit that due process required a hearing for such a basis.

II. Are assumptions in an appraisal to determine value of property taken valid when made purely on a hypothetical basis without regard to the subjective rights and circumstances of the property owner, particularly where there is an underlying statute that protects the interests of the property owner, and when such assumptions admittedly were contrary to the facts and thus beyond speculative and conjectural as condemned in *Olsen v. United States*, 292 U.S. 246 (1934)?

III. Did the Circuit Court prejudge this case on the basis of superfluous and speculative considerations, as indicated by its remarks made at oral argument and as evidenced by its five page memorandum opinion that failed to deal, at all, with many of the critical issues, made egregious errors of fact as to those issues it did address, and thus departed from the accepted and usual judicial proceedings so as to invoke this Court's supervisory authority under United States Supreme Court Rule 10 (a), to rectify such departure in this case, and to consider reforming certain practices in the federal judiciary that led to these repeated Constitutional violations?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner, Waterview Management Company, states that it has no parent corporation and has no non-wholly owned subsidiaries.

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OPINIONS BELOW

The May 20, 1999 decision of the United States Court of Appeals for the District of Columbia Circuit is set forth in the Appendix, p. 1a. A timely Petition for Rehearing was filed, Appendix p. 7a. and denied on July 22, 1999, as set forth in the Appendix, p. 6a. The United States Court of Appeals for the District of Columbia Circuit determined liability on the basis that the contract had been effectively repudiated under FIRREA and remanded to the United States District Court for the District of Columbia for determination of damages, as reported at 105 F.3d 696 (D.C. Cir. 1997). The October 27, 1997 Order of the District Court denying discovery and denying recovery of "consequential or foreseeable damages" is set forth in the Appendix, p. 54a. The November 20, 1997 Order of the District Court denying damages on the remainder is contained in the Appendix, p. 64a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the District of Columbia Circuit issued its decision of the case on May 20, 1999 and issued its Order denying Wateview Management Company's Petition for Rehearing on July 22, 1999. This Petition was timely filed within 90 days of the rehearing denial.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a

witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

12 U.S.C. §1821(e)(1), (2) and (3) (1994) (FIRREA) Financial Institutions Reform, Recovery and Enforcement Act of 1989

(e) Provisions relating to contracts entered into before appointment of conservator or received

(1) Authority to repudiate contracts

In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease –

(A) to which such institution is a party;

(B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

(2) Timing of repudiation

The conservator or receiver appointed for any insured depository institution in accordance

with subsection (c) of this section shall determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment.

(3) Claims for damages for repudiation

(A) In general

Except as otherwise provided in subparagraph (C) and paragraphs (4), (5) and (6), the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be –

(i) limited to actual direct compensatory damages; and

(ii) determined as of –

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(B) No liability for other damages

For purposes of subparagraph (A), the term "actual direct compensatory damges" does not include –

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering

(C) Measure of damages for repudiation of financial contracts

In the case of any qualified financial contract or agreement to which paragraph (8) applies, compensatory damages shall be –

(i) deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract and agreement claims; and

(ii) paid in accordance with this subsection and subsection (I) of this section except as otherwise specifically provided in this section.

STATEMENT OF THE CASE

(Basis For Jurisdiction In United States. District Court For The District of Columbia)

Appellant (hereafter WMC) filed a Complaint against Appellee Resolution Trust Corporation (hereafter RTC), which has been succeeded by statute by the Federal Deposit Insurance Corporation (hereafter FDIC) in the U.S. District Court for the District of Columbia under 12 U.S.C. §1821(e)(3)(A)(B) (1994) Financial Institutions Reform, Recovery and Enforcement Act of 1989. This Complaint, *inter alia*, sought damages based upon the RTC repudiation of WMC's option to purchase one of the two major land masses that constituted its real estate project known as PortAmerica. Damages, although severely diminished by FDIC speculative assumptions as to value, were allowed for the one parcel under option, but were denied, without any hearing, on the remaining parcel.

WMC had demanded a trial by jury. The district court judge, however, had denied, *sua sponte*, a major part of WMC's claim, i.e. that it was entitled to recover for the remainder where the RTC had taken part (Appendix p. 64a). There was no hearing at all on this issue. There was no opinion. The FDIC had made no motion. The court order stated that WMC could not recover for "consequential or foreseeable" damages. The FDIC had not even asserted such a defense.

The Circuit Court did not address the threshold issues of due process and right to trial by jury (Appendix p. 1a). Instead, it affirmed the denial of damages on the remainder but on an entirely different basis, i.e. that different entities owned the two tracts. This issue had not been raised at the lower court level. Thus, there was no hearing on that issue either.

(PortAmerica Described)

This case involved the development of a huge real estate project in Prince George's County Maryland known as PortAmerica. WMC started developing the project in 1984. WMC had always regarded this project as being quasi public as it served so many public interests. The location made it a gateway into Maryland. It was to be a significant addition to Prince George's County, which unfairly was perceived as being a less desirable suburb of Washington, D.C. than the affluent Fairfax and Montgomery Counties. This was the first private project in Maryland to have a minority participation plan. In order to maximize the great potential afforded by its location, WMC hired one of this country's master architects, Philip Johnson, to design the project and its buildings.

There were two major land masses that constituted PortAmerica. One (hereafter the "riverfront tract") was on the Potomac River. The other (hereafter the "Beltway tract") was on the Beltway, route 95. There were an extraordinary number of permits that had to be obtained before construction could begin. The financing for the riverfront tract was provided by HomeFed bank of San Diego.

PortAmerica was approved as one integrated project with mixed uses. The heavy office development was on Route 95 away from the riverfront. Low rise commercial and residential was on the riverfront. The size of the project was approximately 8,500,000 sq.ft. The estimated value of the finished built out project was one and a half billion dollars. Roadways tied the two parcels together as one and provided access to the outside of the project. Construction considerations further tied the project together. It was not possible to take away one part of the project and build the remainder in accordance with the PortAmerica plan.

(The Comprehensive Settlement Agreement)

During the late 1980s, financial problems developed in the real estate industry. As of 1991, the riverfront parcel mortgage went into default when the investor partner was forced to withdraw. At that time most of the permits had been obtained for development and there had been significant improvements of the land and roads. Approximately $100,000,000 had been invested on the project. More than half of this was equity capital placed into the project by the PortAmerica principals and their investors.

It was not uncommon during this period for developers to abandon their real estate project and seek protection of bankruptcy. The principals of PortAmerica never considered this. Everyone connected with PortAmerica recognized its importance. Instead, Plaintiff prepared a creditors' plan whereby the creditors, including the banks, would be repaid from the development proceeds of the project in a prescribed priority. The first priority was that all creditors would be paid in full prior to Plaintiff's receiving any return of its invested capital. This plan was widely appreciated and accepted by the creditors, including HomeFed bank.

Accordingly, a "Comprehensive Settlement Agreement" was reached on January 15, 1992, between HomeFed bank and WMC. This agreement provided for a "friendly foreclosure" whereby HomeFed bank would take title to the

property. WMC then would have an option to purchase it for a period of three years at a price of $17,500,000, subject to certain incremental payments. There was no interest that ran on this option price. After an initial eighteen-month period, the option could be extended for three six-month increments by payments of $2,000,000 for each such six-month extension. These payments would reduce the amount of the option price. Thus, after the first two payments, the option price would be $13,500,000. WMC also had an exclusive right to market this land.

The project had been owned by a partnership known as PortAmerica Associates (hereafter PA). HomeFed bank, however, required as a term of the Comprehensive Settlement Agreement, that another entity - Waterview Management Company (WMC) - be formed to hold the option. This was done as of January 15, 1992, the date of the Comprehensive Settlement Agreement. The principals of PA and WMC were the same.

On July 6, 1992, the RTC took over HomeFed bank as a conservator. This made no difference at that time to WMC, which continued to manage the project, obtain permits, and look for an investor.

In January 1993, Signet bank, which held the first mortgage on the Beltway tract, took title to that property under a "friendly foreclosure" and WMC was given an option to purchase the Beltway tract, just as HomeFed bank had agreed for the riverfront tract.

(The Comprehensive Settlement Agreement Was Breached)

The actual act of repudiation occurred a few months later (when the entities owning the two parcels were the same) when the 1993 Winter-Spring catalog was issued by the RTC, which advertised the property for sale at $6,000,000, thus breaching WMC's exclusive marketing rights. This made it impossible for WMC to get an investor to pay anything more

than that for the property. A tentative settlement [1] was reached in August of 1993 with the RTC, as conservator, for WMC to purchase the land for $6,000,000 or the amount of either of two appraisals being conducted, whichever was higher. However, the RTC, as receiver, took over HomeFed bank, and thus the project, in December 1993, and refused to honor that tentative agreement.

During 1993, WMC had located an investor. WMC endeavored to purchase the land from the RTC throughout 1994. WMC offered a non-refundable deposit of $500,000 with no conditions, a 90-day settlement, at the full advertised price, all cash. The RTC refused to sell. WMC filed suit in September, 1994.

(Litigation History)

The RTC filed a Motion to Dismiss. WMC requested an oral argument but the lower court never responded. After holding the case for about a year after briefing was completed, the lower court granted the RTC Motion to Dismiss. WMC appealed.

In its decision dated January 27, 1997, the Circuit Court ruled that the RTC had effectively repudiated the contract when it breached the exclusive marketing term by advertising the property in its 1993 Winter-Spring catalog and remanded to determine for damages. The owners of the two parcels were identical at the time of this breach.

On remand, the case was assigned to the same judge who had granted the Motion to Dismiss. During pre trial, the judge openly expressed his opinion that the project had been lost prior to repudiation due to the economic problems in the real estate industry. This prejudiced and erroneous opinion was protested by WMC.

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[1] The Circuit Court had found in its prior decision that there was no binding agreement reached.

WMC moved for discovery and asked for the records of HomeFed bank, which already had been shipped from California to Washington, D.C. for that purpose. The lower court denied this discovery motion (Appendix p. 54a).

The lower court judge then denied, *sua sponte*, damages to the Beltway tract that the WMC appraiser had calculated to be $12,000,000. WMC had briefed the rights of a remainder extensively. The FDIC cited no cases, had made no motion and made no argument.

The lower court wrote no opinion as to why these damages to the remainder were denied. Its order denied damages that were "consequential or foreseeable." (Appendix p. 54a) The matter of foreseeable damages was briefed in accord with *Hadley v. Baxendale*, 9 Exch. 341, 5 Eng. Rul. Cas. 502 (1854), as the judge had requested. The briefing clearly supported WMC's position. "Consequential damages" had not been raised by the FDIC.

WMC filed a motion (Appendix p. 56a) for the lower court to certify these issues to the Circuit Court before proceeding with the jury trial, arguing that, because of these rulings, a trial would be a "waste of everyone's time." The court denied this motion (Appendix p. 64a).

(Both Appraisers Used The Same Method
And Reached The Same Findings)

The appraisals by the FDIC and the WMC appraisers were virtually the same. Both recognized that the PortAmerica plan was the highest and best use of the land. Both projected net cash flow over a period of years and then discounted that cash flow back to a present value. The FDIC appraisal was $35,000,000. The WMC appraisal was $36,000,000. Both appraisals excluded the element of profit. It is important to understand that these appraisals were not done by comparing like properties.

(The Deductions From Value By The FDIC
Were Speculative At Best)

However, the FDIC appraiser then made some extraordinary deductions from her appraisal. These were directed by the FDIC attorney only for purposes of this litigation and had no factual basis. The deductions were based upon assumption that the owners of the Beltway tract would be uncooperative to the owners of the riverfront tract. The FDIC appraiser then assumed that the Beltway tract would have to be purchased by the owner of the riverfront tract. Then she deducted certain costs, such as interest carry to the Beltway tract for a three-year period, from the value of the riverfront tract. At the end of the three-year period she assumed that the Beltway tract would be sold at the price paid for it three years prior, without any increase due to the improvements. These assumed deductions added up to $23,000,000 and reduced her appraisal to $12,000,000.

This assumption was an absurdity, as the principals of the owners were the same. The FDIC appraiser admitted on cross-examination that her appraisal would not be valid if there were common control of the two parcels (Appendix p. 52a).

(The Jury Trial)

The trial proceeded based upon damages to only the riverfront tract. Plaintiff was given two days to explain this complex project and all these pricing issues to the jury. Mr. Lewis described the project. The WMC appraiser and then the FDIC appraiser testified as to the value of the property. In so doing, the FDIC appraiser testified that the deductions she made were based upon the assumption that the owners of the two tracts would not be cooperative. WMC's attorney objected to this testimony. The court ruled that, hypothetically, the parties were to be assumed uncooperative (Appendix p. 53a). The court then refused to permit Mr. Lewis to testify on rebuttal. The jury returned a verdict based upon the lower tract having a value of $20,000,000. The option price of $17,500,000 was then deducted which produced a jury award of $2,500,000. A motion for pretrial interest was granted by the court.

WMC made its motions for a new trial and for reconsideration. These motions were denied. WMC appealed.

(The Circuit Court Pre Judged This Case As Evidenced By Its Words And Opinion)

Oral argument was heard by the Circuit Court on May 10,1999. This Court is asked to review the transcript of this oral argument (Appendix p. 24a) to understand the extent to which the Circuit Court departed from the usual judicial process in its deliberations (or lack thereof) of this case.

At an early stage in the oral argument one of the judges referred to the project as already being "in the toilet" at the time of repudiation (Appendix p. 45a). This was vehemently denied by WMC who pointed to the fact that the Comprehensive Settlement Agreement had just been made and there were two and a half years left of its option as of July 6, 1992.

This demonstrates the Circuit Court's prejudice. Because the Court believed this, it follows that it believed that WMC already had lost its investment in the project because of the difficult real estate times and was unfairly trying to recoup against the FDIC for moneys that already had been lost. That was not at all the case. Briefly stated, the record (Amended Complaint and Answer) proves that WMC remained on the project throughout 1994 and was in a position to proceed with development. The damages should be determined on the basis of the RTC's causing the loss of a project that was fully approved and permitted with financing committed. Many projects did fail and were abandoned during this period, but PortAmerica was not one of them. There was no hearing, either, on this issue of whether the loss was incurred prior to the repudiation.

Within ten days after oral argument, the Circuit Court issued a five page memorandum opinion (Appendix p. 1a) dated May 20, 1999. Not one case was cited to support the court's opinion as to the substantive issues.

The only cases cited addressed the discretionary rights of a trial judge.

The Opinion did not address the issue of due process, at all. It denied damages on the Beltway tract on the basis that the two tracts were owned by different entities, an issue that had not been brought up in the lower court so there was no hearing on that issue.

The Circuit Court's ruling without a hearing was in direct contradiction to that of the Fifth Circuit in *United States v. 8.41 Acres of Land, Situated In Orange County, State of Texas*, 680 F. 2d 388 (5th Cir. 1982). That court held that due process was violated if there was no hearing on the unity of property, including the unity of ownership issue. The "consequential or foreseeable" basis of denial by the lower court was not even addressed by the Circuit Court.

It did not address the issue of "consequential or foreseeable damages," which was the basis of the lower court's decision. It did not address the issue that WMC was a successor in interest to PortAmerica Associates when the suit was filed or that at the actual time of repudiation, the entities were the same. Either of these facts would have defeated the basis of its decision - that the entities were different. The decision grossly misstated material facts and did not address any of the several legal arguments and authorities cited by WMC.

Appellant filed a Petition for Rehearing of the court's decision on June 18, 1999. (Appendix p.7a.) This was denied on July 22, 1999. (Appendix p.6a.)

ARGUMENT

I. WMC's CONSTITUTIONAL RIGHTS OF DUE PROCESS AND TRIAL BY JURY WERE VIOLATED REPEATEDLY IN THIS CASE.

WMC had a constitutional right to a hearing as to the remainder issue, *U.S. Constitution, Amendment V.* It had a

right to a trial by jury of that issue, which it had demanded, *U.S. Constitution, Amendment VII.* These rights were violated repeatedly by the courts in this case.

A. The Lower Court Denied Damages to the Remainder Tract Without A Hearing and on a Basis In Conflict With Established Law.

Upon remand, the lower court, *sua sponte*, denied the claim for damages on the Beltway tract. There had been no motion by the FDIC. WMC protested vigorously that its constitutional rights thereby were violated and filed a Motion prior to trial to certify this issue to the Circuit Court. WMC argued that a trial that did not include this remainder issue would be "a waste of everyone's time." (Appendix p. 56a) Not only was a $12,000,000 claim completely excluded, but the explanation of the overall project was compromised. Thus, the proof of the riverfront tract damages would be prejudiced as well. The lower court denied this motion.

The basis of the lower court's order was that it would not allow damages that were "foreseeable and consequential." "Foreseeable damages" as defined in *Hadley v. Baxendale, supra*, had been briefed as the lower court ordered. The brief totally supported WMC's position. The court then simply found, without any rationale or authority that "foreseeable damages" were not recoverable.

In the case of *DPJ Co. v. FDIC*, 30 F.3d 247 (1st Cir. 1994), the Court held:

> Contract damages are often calculated to place the injured party in the position that that party would have enjoyed if the other side had fulfilled its part of the bargain. . . . [T]he resulting damages can fairly be described as "direct", a term normally used to filter out damages that are causally remote, unforeseeable" or both. (emphasis added)

Id. at 248-49.

The necessary corollary of the *DPJ* holding that "unforeseeable damages" are not recoverable is that damages that are foreseeable are recoverable. Thus, the lower court's holding in this case conflicts with *DPJ*. There was nothing "causally remote" or "unforeseeable" about the damage to the Beltway tract when WMC's option to purchase the riverfront tract was repudiated.

The FDIC had never briefed nor argued the issue of "consequential damages." The judge offered no rationale or authority in support of that order.

In the case of *U.S. v. General Motors Corp.*, 323 U.S. 373 (1944) this Court held at page 382 that damages to the remainder were not to be considered as consequential:

> It is altogether another matter when the government does not take [GM's] entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves [GM] holding the remainder, which may then be altogether useless to him, refusing to pay more than the "market rental value" for the use of the chips so cut off. *This is neither the "taking" nor the "just compensation" the Fifth Amendment contemplates.* (emphasis added).

The FDIC on appeal briefed this issue as one that equated consequential damages with future profits and speculative damages, but its own appraisal refuted this untenable position. The FDIC appraisal method for the riverfront tract was the same as WMC's method. The profit element was removed by both the FDIC and WMC in their appraisals.

In the case of *McMillan v. FDIC*, 81 F.3d 1041 (11th Cir. 1996), the Court wrote a comprehensive analysis of the meaning of "direct compensatory damages" under FIRREA:

> "Compensatory damages" are defined as those damages that "will compensate the injured party for the injury sustained, and nothing more; such as will simply

> make good or replace the loss caused by the wrong or injury." Black's Law Dictionary (6th Ed. 1991). "Actual damages" roughly synonymous with compensatory damages, are defined as "[r]eal, substantial and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury, as opposed...to 'nominal' damages [and] 'punitive damages.' *Id.* Finally, "[d]irect damages are such as follow immediately upon the act done." *Id.* Thus, "actual direct compensatory damages" appear to include those damages, flowing directly from the repudiation, which make one whole, as opposed to those which go farther by including future contingencies such as lost profits and opportunities or damages based on speculation.

Id. at 1055. (citation omitted) (footnote omitted).

B. The Circuit Court Affirmed on a Basis Not Raised In The Lower Court So There Was No Hearing On That Issue Either.

Arguments in this Petition were briefed and argued to the Circuit Court on appeal. The Circuit Court simply did not address the issues of due process, rights to a jury trial, or whether foreseeable and consequential damages may be recovered. Instead, the Circuit Court held that WMC could not recover for the remainder because the "parties were different." This issue had never been raised at the lower court. This issue was raised for the first time in an FDIC brief to the Circuit Court, but not in relation to the lower court's holding. Rather, this was argued in connection with the takings issue.

C. The Denial Of Damages To The Remainder Tract On The Basis That The Entities Were Different Even Though The Principals Were The Same, Without A Hearing, Conflicts With The Fifth Circuit Holding That Due Process Requires A Hearing On That Issue

The issue of different entities was presented in *United States v. 8.41 Acres of Land, supra*, which held, citing *Bragg v. Weaver,* 251 U.S. 57, 58-59, 40 S. Ct. 62, 63 (1919) at page 395, that:

> In an exercise of the power of eminent domain, due process requires that owners be given an opportunity to be heard on the issue of compensation. (emphasis added)

And further at page 393 the court held that:

> Where applicable the issue of separateness or unity is a question of fact to be tried by the trier of fact, citing *United States v. Reynolds*, 397 U.S. 14, 18-19 (1970) (other cases omitted). Three factors are particularly helpful in ascertaining whether property taken is part of a single, larger tract: physical contiguity, unity of ownership and unity of use.

The remainder issue in the present case is the same as in the eminent domain cases. The holding of the Fifth Circuit is correct that due process requires a hearing.

D. The Court Erred In Its Finding That The Parties Were Different.

The holding should not be based upon the merits but rather on the threshold issue of due process. Nevertheless, the Court erred in several respects in connection with the merits.

The entities were, in fact, the same in the spring of 1993. WMC at the time of the breach held the option on both tracts.

The Circuit Court erroneously, and in contradiction to its own holding in *Office and Professional Emp. Intern. v. FDIC,*

27 F.3d 598, 604 (D.C.CIR. 1994) applied the theoretical date in FIRREA when the conservator was appointed to determine that the entities were different, although the principals were the same.

Even assuming, *arguendo*, that the Circuit Court's use of the theoretical date was correct, it nevertheless erred when it found the parties were different because the principals were the same.

The precise issue of unity of property as determined in part by unity of ownership where one party is a corporation and the other another form of entity has not been decided in the federal courts. The state courts are divided on the issue as to whether there can be unity of ownership where one part of the property is owned by a corporation and the remaining by another entity, e.g., a partnership. Thus, North Carolina in the case of *Board of Transp. v. Martin*, 296 N.C. 20, 249 S.E.2d 390 (N.C. 1978) ruled against such unity of ownership, while New Jersey in the case of *Housing Auth. Of Newark v. Norfolk Realty*, 364 A.2d 1052 ruled in favor of it.

Finally, WMC clearly filed the Amended Complaint in September, 1994, as a successor in interest to PortAmerica Associates.

II. THE DEDUCTIONS FROM VALUE TAKEN BY THE FDIC APPRAISER VIOLATE THE HOLDING OF *OLSEN V. UNITED STATES, supra*

A. Controlling Law

This Court held in *Olsen v. United States, supra*, at page 257:

> Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for

> the ascertainment of value – a thing to be condemned in business transactions as well as in a judicial ascertainment of truth" (emphasis added).

B. The FDIC Assumptions Violate Both FIRREA and *Olsen*

1. The Test to Determine Damages Under FIRREA is Subjective.

The Court erroneously stated at page 4 of its opinion, that WMC's view was too "subjective."

The FDIC said its appraisal was good "for anyone but the owner of the Beltway tract," tr. 350. Cases decided under FIRREA hold that the intent of that law is to "make the party whole." Obviously the test is subjective to the party whose contract is repudiated. The FDIC's statement that its appraisal was good for anyone but the owner of the Beltway tract was contrary to FIRREA and therefore, the FDIC appraisal is invalid.

This issue of subjective interest also has been decided by *Olsen*. In that case the owner of property was denied compensation on the basis that the use of his land as a reservoir was not probable because of the limited amount of land that he owned, even though this was a possibility. This was entirely a subjective test applied by this Court as it looked to the circumstances of the owner of the property. At pages 254-5, in *Olsen,* the Court held:

> In any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.

and

> No private property shall be appropriated to the public use unless a full and exact equivalent for it be returned to the owner.

2. The Assumption That the Owners of the Two Tracts Would Not Cooperate was an Absurdity Because They Were the Same Principals.

Particularly because the subjective circumstances of the owner must be considered, the FDIC appraiser's assumption that the owners would not cooperate, was an absurdity. The FDIC appraiser admitted that her appraisal would not be valid if there were common control, (Appendix p. 52a). (It is not relevant to this issue of deduction whether the entities were or were not the same.)

The FDIC assumption of uncooperative owners also contradicted the cooperation specifically agreed in the Comprehensive Settlement Agreement, Trial Exhibit 4:

> 5.2 Joint Development Agreement...
>
> Borrower [PortAmerica Associates], WMC and Lender hereby agree to use good faith efforts to cooperate with each other to market the Beltway Property and the Property as one project. (Emphasis added)

This was a tri partite agreement. PortAmerica Associates, WMC and and the bank (that the RTC took over) all agreed to cooperate with one another in the development and the marketing of the project as a whole.

The Beltway owner thereby already had agreed to cooperate with the development and marketing of PortAmerica. Thus, an assumption that the Beltway owner would not cooperate was contrary to an agreement that already existed between the owners of the two parcels. The lender had agreed with WMC that there would be cooperation in the marketing of this property. The RTC assumed these obligations. Having agreed to cooperate, the RTC breached that term when it assumed that the owners would not cooperate.

3. The FDIC Assumption That The Parties Would Not Cooperate On The Same Project, And That The Other Tract Would Have To Be Purchased, In Any Case, Was Conjectural And Violated *Olsen*.

Assuming, *arguendo*, that the FDIC view that fair market value must be considered in the abstract, and that FIRREA does not permit subjective considerations, an assumption that the parties would not cooperate is erroneous as a matter of law. In the abstract, the parties would act in their own best interests and cooperate, as they did in the tri partite agreement above. This is necessary for an integrated project where development of one part depends on the other. The probability, *Olsen, supra*, is that they would cooperate because it is in their mutual best interests for the project to succeed, as Mr. Bunch testified at tr. 233-4.

The assumption, even in the abstract, that the Beltway owner would be so uncooperative that the riverfront tract owner would have to purchase the upper tract in order to develop the riverfront tract was highly conjectural. In the first place, the roads through the upper tract were dedicated so it would not even be necessary to purchase the Beltway tract to get access. Secondly, the idea that the owner of the Beltway tract would not let the owner of the riverfront tract improve the Beltway property by running a road through it was totally implausible. Why wouldn't he? It would improve his property at no expense.

4. The FDIC Deductions Were Based on Other Speculative and Conjectural Assumptions

(a) Charging expenses from the Beltway tract, but not allowing revenues, was unfair and inconsistent. The District Court ruled that WMC was not entitled to recover its damages based upon the loss of the Beltway tract. If WMC was not entitled to revenues, the FDIC should not be permitted to charge WMC for expenses on the Beltway that

would be absorbed by such revenues. This general rule has its antecedents far back in the common law, as expressed in the following maxim: *Qui sentit commodum sentire debet et onus* ("He who receives the advantage ought also to suffer the burden").

(b) The FDIC assumed that in order to develop the riverfront, its owner would need to purchase the upper tract and hold it for three years. Expenses in connection with this purchase price and with the costs of highway improvements allocated to the upper tract, such as interest at 12% for three years, then were deducted from the riverfront tract value. The entire three years of interest deduction was taken in the first year which is by definition unrealistic. It was then assumed that at the end of the three year period, the owner of the riverfront tract would sell the upper tract for exactly the same price that was paid for it plus the capital costs of the "Beltway connector." Nothing was added to the sales price for the three years of interest to carry the upper tract, nor for the millions spent for the substantial improvements made to it. The reason is obvious. Any increment in the sales price would have to be credited against the deductions. The FDIC was not realistic or fair and was motivated only by litigation tactics.

(c) Additionally, all the deductions for the construction of the highway system (erroneously called the "Beltway connector" by the FDIC appraiser) were made in the first year. The fewer years costs are discounted, the higher they would be and the lower the appraisal. An extreme deduction from value occurs if costs are assumed to be in the first year, because in that case there would be no discount at all. The phasing plan, Trial Ex. 10, sheet #4, showed the highway system to be constructed in the fourth and fifth years in sequence following the construction of the major office building. The FDIC appraiser's first year assumption defied logic, the facts, her own exhibits, and the law of the *Olsen* case.

C. The Court's Patent Misunderstandings

The Circuit Court's statement at page 4 of its opinion, referring to WMC's claim as "allocating the costs of necessary improvements to both parties" was not the issue at all. This would be perfectly normal. However, the costs already had been allocated to the respective tracts in the pro formas made long before this case. The problem was that the FDIC appraiser allocated expenses to the riverfront tract that had already been fairly allocated to the Beltway tract.

The statement by the court at page 4 that "...the Beltway owner might have treated Waterview more favorably..." and this would "...require a determination of the extent to which the Beltway owner would have been willing to bear costs in excess of those a rational, self-interested owner would have borne" was just the reverse of WMC's position. WMC never expected the Beltway owner to bear any costs that were attributable to the riverfront tract. The problem was that the FDIC deducted expenses that were attributable to the Beltway from the riverfront tract.

The FDIC appraiser did not assume an "arms length transaction" (as the court said). She assumed that the owners would be "uncooperative." Assuming, *arguendo*, that the FDIC had assumed an "arms length transaction," this still is quite different from "common control" which was the undisputed fact of the case.

III. THIS HONORABLE COURT IS ASKED TO EXERCISE ITS SUPERVISORY FUNCTION TO CORRECT THE JUDICIAL PROCESS IN THIS CASE THAT WAS OUTSIDE THE USUAL AND ACCEPTED JUDICIAL PROCEEDINGS.

Supreme Court Rule 10 (a) provides for review if a United States court of appeals "... has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." This is an

extreme case where the judiciary system has not functioned with its requisite objectivity and fairness. This case was complex, both factually and legally. It involved genuine issues of due process, right to a trial by jury, the right to recover for damages to the remainder when part of the property is taken and the interpretation of a federal statute as to critical issues (the appraisal methods used, the assumptions used in appraisals that violated established law and basic principles of fairness, that consideration should be given to subjective rights in determining fair market value, etc.) The equity capital invested in this project exceeded $50,000,000. The time spent by WMC and its principals was approximately ten years of intensive effort. WMC had done nothing irresponsible or ethically wrong. It sought to provide a great project for a deserving community. It had stayed with the project through the recession and had made extraordinary efforts to repay the banks completely, including interest. WMC did not file this lawsuit primarily to recover monetary damages. Its predominate purpose was to exercise its option and develop the property. WMC made every effort to avoid this litigation. At the time the RTC refused to sell the land to WMC in 1994, WMC had secured an investor and was willing and able to proceed with development.

First the lower court and then the Circuit Court treated WMC with a disregard of these facts and evidently assumed, instead, that WMC had come into court after its project had gone "in the toilet" and was unfairly seeking to recover against the FDIC. That is factually, ethically and Constitutionally wrong.

The Circuit Court issued its five-page memorandum decision, dated May 20, 1999, which WMC respectfully submits departs from the judicial process in many ways. To summarize briefly:

1. It failed to address the constitutional issue of due process because WMC did not get any hearing on the remainder issue;

2. It failed to address the constitutional rights to a trial by jury as demanded by WMC;

3. It affirmed the lower court's denial of damages on the remainder on an entirely different basis that was never brought up at the lower court and thus there was no hearing on either issue;

4. The failure to provide a hearing on the issue of unity of ownership put this court in direct contradiction to the Fifth Circuit which held that due process required a hearing on the issue;

5. It failed to address the basis of the lower court's order that denied damages on the Beltway tract;

6. It did not cite one legal authority nor respond to the several legal and factual arguments made by WMC in support of the substantive issues;

7. As to those issues that the Circuit Court did address, it made egregious errors as to material facts and arguments; for instance: a) the mistakes discussed in Section II of this Argument as to the deductions from value; and b) the denial of the WMC claim for damages based on the aborted option which had been interest free for three years. The Court based its denial upon its misunderstanding that the $2,000,000 increments added to this option price; this was completely in error. The incremental payments reduced the option price, as all of WMC's briefs explained. This established fact was never questioned by the FDIC.

8. The Circuit Court recognized that there was a breach of contract (and therefore damages) where the three year, interest free option was aborted within six months but nevertheless denied the claim on the basis of its uncertainty of the amount of the damages, which contradicted its own holding in the *Office and Professional Emp. Int.* case, *supra*.

The extremes exhibited by the Circuit Court, by affirming and then acting *de novo*, in implementing their pre judged notions without any hearings, are illustrated by noting that in virtually every one of the decisions by these courts, there is a conflict with either the precedent set by this Court, one of the other Circuits, and in the case of # 8 above, even conflicts with its own former ruling.

The ultimate irony is that WMC is being punished, without a hearing, on an erroneous assumption that, as with most other developments of the time, PortAmerica already had failed and WMC had come into court seeking to recover from the government for losses already experienced; in fact, this developer did everything possible to keep the project going, provide for creditors including the banks, and to avoid the present litigation.

CONCLUSION

This case involves certain issues about which there should be no question. WMC's Constitutional rights to a hearing and a jury trial on the remainder issue repeatedly were violated. Those issues are well settled.

However, this case also presents certain questions within the federal court system that merit definition.

1. May a Circuit Court of Appeals affirm on a basis that was not raised in the lower court while not even addressing the basis of the lower court's decision?

2. What are the responsibilities for the Circuit Court to issue a learned and responsive decision to address

the facts, various arguments and authorities cited by appellant in its briefs and oral argument?

3. Is the judicial process adequately served by finding against a party on the basis of a superfluous and speculative issue that was not the subject of trial or even allowing such an issue to influence the decision as it obviously has done in this case?

4. In determining the merits of a claim decided by the date of ownership, should the theoretical date for the calculation of damages in the statute apply or should the factual date of the act that gave rise to the claim apply?

5. Whether unity of ownership, in determining unity of property, should be recognized where, although the same principals, there is a corporate owner of one parcel and another entity of the remainder parcel; or whether this depends upon the facts and circumstances of the particular case.

6. Are the following principles of this case to be applied to, for instance, property taken under eminent domain: (a) that appraisals are to be allowed that are based upon purely hypothetical assumptions that dispute the actual facts of the case; (b) that the subjective interests of the property owner whose property is taken are to be ignored in future appraisals; (c) that the subjective interests of the property owner are to be ignored even where there is an underlying statute that is intended to protect the property owner?

7. To What extent may the judicial process depart from the usual and accepted judicial procedures for this Court to exercise its supervisory function?

8 Should this Court exercise its supervisory function to modify the rule (or practice), of the Court of Appeals remanding a case to the same lower court judge who heard the case in the first instance, by giving the successful appellant the right to a different judge?

WMC asks this Court to grant *certiorari* and upon review to order a new trial. Its Constitutional rights to a hearing on the remainder were repeatedly violated. Even the hearing on the riverfront tract was unjust because: a) proof of the Beltway tract was excluded and thus the jury was unable to judge the riverfront tract value as part of the overall PortAmerica project. As WMC argued in its Motion for Certification, the trial with the Beltway tract excluded would be a waste of everyone's time; and b) the jury determined value on the basis of the lower court ruling that the assumption of uncooperative parties was proper in this case.

In the alternative, WMC asks this Court: a) to accept the appraisals on the riverfront tract in view of the similarity of the FDIC appraisal of $35,000,000 and that of WMC, which was $36,000,000, rather than to retry that issue, but to disallow the deductions from value taken by the FDIC that were based upon speculative assumptions; and b) to order a hearing on the Beltway tract damages.

Respectfully submitted,

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(703) 847-9665

October 18, 1999

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-7138 **September Term, 1998**

Waterview Management Company,

Appellant

v.

Federal Deposit Insurance Corporation,

Appellee

Appeal from the United States District Court
for the District of Columbia
(No. 94cv01930)

FILED
May 20 1999
Clerk

Before: SILBERMAN, HENDERSON and GARLAND, *Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments of counsel. While the issues presented occasion no need for a published opinion, they have been accorded full consideration by the Court. *See* D.C. Cir. Rule 36(b). For the reasons in the attached memorandum, it is

ORDERED and ADJUDGED that the judgment form which this appeal has been taken be AFFIRMED.

The Clerk is directed to withhold the issuance of the mandate herein until seven days after the disposition of

any timely-filed petition for rehearing. *See* D.C. Cir. RULE 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY:

John T. Haley
Deputy Clerk

MEMORANDUM

Following its appointment as Receiver for HomeFed Bank, the Resolution Trust Corporation (RTC) repudiated appellant Waterview Management Company's three-year option to purchase from the bank a parcel of land known as the Waterfront Tract. That parcel was one of two, the other known as the Beltway Tract, that together were intended to form a real-estate development called PortAmerica. Waterview sued the RTC over the repudiation, and the Federal Deposit Insurance Corporation (FDIC) was substituted for the RTC pursuant to the Resolution Trust Corporation Completion Act, 12 U.S.C. § 1441a(m)(1). After a decision by the district court, appeal to this court, and subsequent remand, *see Waterview Management Co. v. FDIC*, 105 F.3d 696 (D.C. Cir. 1997), the district court conducted a jury trial to compute the damages to which Waterview was entitled under the Financial Institutions Reform Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C.§ 1821(e)(3). The court calculated the damages owed Waterview by subtracting Waterview's option price from the fair market value of the Waterfront Tract at the time of the repudiation.

Waterview asserts, inter alia, that the district judge erred by: (1) excluding any recovery for damages to the Beltway Tract; (2) calculating the value of the Waterfront Tract by treating it as if its owner were unrelated to the owner of the Beltway Tract; (3) refusing to discount the option price to reflect the fact that the option was repudiated before its term had run; (4) denying some of Waterview's discovery requests; and (5) denying Waterview permission to present a rebuttal witness. Waterview also argues that, unless its view of the measure of damages available under FIRREA prevails, the RTC's repudiation constituted an unconstitutional taking of its property without just compensation. We reject each of appellant's challenges and affirm the judgment of the district court.

We turn first to appellant's argument that it was entitled to recover for damages to the value of the Beltway Tract. FIRREA provides that damages for repudiation "shall be limited to actual direct compensatory damages . . . [which does] not include damages for lost profits or opportunity." 12 U.S.C. § 1821 (e)(3). Appellant asserts that when the repudiated contract is part of a larger project, and the value of another parcel in the project is diminished because of the repudiation, "actual direct compensatory damages" includes damage to the remainder parcel. But even if that were true, Waterview cannot assert a claim for damages to the Beltway Tract because it did not own that property at the time of repudiation -- another company did. Although the principal investors in both companies were the same, the companies themselves were distinct legal entities and Waterview cannot recover for damages to a property it did not own.

We also reject appellant's argument that the district court erred by permitting the jury to determine the value of the Waterfront Tract as if its owner were unrelated to the owner of the Beltway Tract. The FDIC's expert witness appraised the value of the Waterfront Tract by assuming that the two tracts' owners would have dealt with each other at arm's-length when allocating the costs of certain necessary improvements to both properties. Waterview asserts that this assumption was improper because the owners of the parcels were not strangers, and hence the Beltway owner might have treated Waterview more advantageously than a stranger. We decline to accept appellant's attempt to define the fair market value of the Waterfront Tract in such subjective terms. To compute value on appellant's theory would require a determination of the extent to which the Beltway owner would have been willing to bear costs in excess of those a rational, self-interested owner would have borne. There was no basis for the jury to make such a determination other than speculation.

We also find no error in the district court's refusal to instruct the jury to discount the option price to account for the

fact that the RTC repudiated the option only six months into its three-year term. In fact, the option was not available to Waterview at the same price throughout the three-year term; after the first eighteen months, Waterview would have had to pay an additional $2 million fee for each six-month extension. The district court held that because Waterview had not offered any expert testimony regarding the value of the asserted discount, "the jury has no way of calculating what the discount would be, particularly with the three $2 million bumps . . . ." Under those circumstances, there was again no basis other than speculation to make the determination sought by Waterview.

Appellant's remaining claims are likewise without merit. Although Waterview challenges the district court's denial of a discovery request, it has not pointed to any documents whose discovery would have so assisted its case as to justify our interfering with the district judge's broad discretion in such matters. *See generally Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 788 (D.C. Cir. 1983) (describing breadth of district court's discretion regarding discovery). The district judge declined to permit testimony by Waterview's rebuttal witness for two quite appropriate reasons: the witness proposed to testify concerning a report he created after being deposed, and after it was represented to defendant's counsel that there would be no further reports; and the proposed testimony was improper rebuttal because it could have been included in the same witness' direct examination. *See generally Geders v. United States*, 425 U.S. 80, 86 (1976) (discussing broad powers trial judge has to manage trial, including rebuttal testimony). Finally, we reject Waterview's claim that FIRREA's measure of damages for repudiation constitutes an unconstitutional taking without just compensation, because Waterview did not assert such a Fifth Amendment claim in its complaint and did not raise the argument below.

The judgment of the district court is affirmed.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-7138 **September Term, 1998**
94cv01930

Waterview Management Company,
Appellant

Portamerica Development Company, L.C.,
Appellee

v.

Federal Deposit Insurance Corporation, As successor to federal defendant,
Appellee

FILED
July 22, 1999
Clerk

BEFORE: Silberman, Henderson and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed June 18, 1999, it is ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Robert A. Booner

Robert A. Booner
Deputy Clerk

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 98-7138

WATERVIEW MANAGEMENT COMPANY,
Appellant

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Appellee

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

I. CONCISE STATEMENTS OF ISSUES AND IMPORTANCE

A. Issue: Did the trial court's denial of a trial by jury - as demanded by WMC - on its claim for damages to the remainder of the parcel of land after part was taken by the government violate due process and its right to a jury trial?

Importance. This court did not address this threshold issue specifically, thus affirming the lower court's decision on the merits and denying WMC's claim without a hearing. This result conflicts with that in United States v. 8.41 Acres of Land, Etc., 680 F.2d 388 (5th Cir.1982), which held that due process requires a hearing by the fact finders on the issue of unity of the property, including unity of ownership. Plaintiff's demand for a jury trial on this issue was denied by the lower court, violating Plaintiff's right to a trial by jury.

B. Issue: Did the court err when it found that a "different company" owned the remainder tract, and thus there was not the requisite unity of ownership to support the

claim for damages to the remainder: 1) by not addressing the fact that WMC was the acknowledged successor in interest when the suit was filed; and/or 2) by not recognizing that the principals were the same and there was a common business purpose?

Importance. There has not been a definitive case in the federal courts dealing with unity of ownership where a corporation owns one parcel and the remainder is owned by the shareholders of that corporation, individually or in another entity. The states are divided on this issue which is governed by principles of law common to eminent domain cases. The present case should be decided in WMC's favor for any one of the reasons presented.

C. Issue: Should WMC's claim, that the FDIC assumptions were so speculative that they clearly violated Olson v. United States, 292 U.S.246 (1934) be reconsidered because the opinion reflected a patent misunderstanding of this issue?

Importance. The excessive nature of the assumptions was beyond speculation and conjecture, as "condemned" in Olson. They were contrary to admitted facts. They were directed by the FDIC attorney only for purposes of this litigation and had no independent validity. The opinion also raises a significant issue as to what extent, if any, subjective interests and circumstances of the owner should be considered in determining the value of property and whether such considerations would be affected by the underlying statute, which in this case is FIRREA. The opinion reflects a complete misunderstanding of these issues.

D. Issue: Should WMC be entitled to recover for an undisputed breach of the option contract where this court found that the measure of damages was not supported by sufficient evidence, even though the lower court ruled as a matter of law to disallow this claim and precluded further evidence?

Importance. This court's finding is inconsistent with the well established principle that, while the facts regarding the breach must be definite, the proof of damages may be inexact, Office And Professional Emp. Intern., v. FDIC, 27 F.3d 598 (D.C. Cir. 1994). If, upon reconsideration, this court still believes there was insufficient proof of damages, it is asked to remand this issue, because the lower court denied this claim as a matter of law and thus precluded further proof of facts.

II. FACTS

Appellant believes that this court's opinion reflects misunderstanding of many facts and issues of this complex case. WMC seems to be perceived by this court as a party who already had lost its investment by the date of repudiation and now unfairly seeks to recoup its losses by complaining of an arms length appraisal containing reasonable assumptions. The expression by the court at oral argument that the project was "in the toilet" by the July 1992 date of repudiation was prejudicial and contrary to the facts.

In fact, WMC was one of the few developers who did not quit during difficult times, but continued with the development and its plan to repay the bank. As the record (Amended Complaint and Answer) shows, WMC remained constantly on the project for more than two years after that. In 1994, WMC had obtained an investor but the RTC wrongfully refused to sell the land to WMC even though it offered the full RTC advertised price. It was this RTC capricious action, more than two years after the date of repudiation, which was the sole cause of the loss of PortAmerica. The damages are properly measured by the loss of an entirely viable project, fully permitted, with funding committed. Recovery of the full amount claimed would not nearly compensate for this loss. These facts are not stated to raise old issues that have been preempted by the repudiation,

but they clearly refute the court's incorrect perception that the project already had failed two years prior.

On July 2,1992, PortAmerica Associates was the owner of the Beltway tract and WMC was the owner of the riverfront tract. The principals were the same. WMC had been formed at the insistence of HomeFed bank when the Comprehensive Settlement Agreement was made. WMC prepared a creditors plan, based upon the development of the entire project, which provided that creditors, including the banks, would receive full payment, including interest, before WMC would receive any return of its $50,000,000 invested capital. HomeFed bank joined this plan. WMC became the owner of the option on the Beltway tract in January 1993. The act of repudiation occurred after that date. The suit was filed after that date.

The trial proceeded over WMC's objection that the Beltway tract should be included. Both appraisers found that the highest and best use was to develop the land as PortAmerica.

III. ARGUMENTS IN SUPPORT OF WMC'S POSITION ON ISSUES

A. VIOLATION OF DUE PROCESS ON BELTWAY TRACT

1) The Threshold Issue Is Not Whether The Upper And Lower Tracts Were Unified But Rather Whether WMC Was Entitled To A Trial Of This Issue.

WMC filed a Motion for Clarification, Reconsideration and Certification prior to trial in which it asked the lower court to certify the issue of its right to a jury trial on the upper tract to the Court of Appeals rather than proceed with the trial. WMC further argued in support of its Motion that it would be a "waste of everyone's time" to proceed with the jury trial if the upper tract issue were excluded without a trial. The court denied that motion.

2) Due Process Requires A Hearing On The Beltway Tract

In United States v. 8.41 Acres of Land, Etc.., supra, page 1, the 5th circuit court, citing Bragg v. Weaver, 251 U.S. 57, 58-59, 40 S. Ct. 62, 63 (1919) held at page 395:

> "In an exercise of the power of eminent domain, due process requires that owners be given an opportunity to be heard on the issue of compensation." (emphasis added).

And further at page 393 the court held that:

> "Where applicable the issue of separateness or unity is a question of fact to be tried by the trier of fact, citing United States v. Reynolds, 397 U.S. 14, 18-19 (1970). (other cases omitted) Three factors are particularly helpful in ascertaining whether property taken is part of a single, larger tract: physical contiguity, unity of ownership and unity of use."

The subject case involves the same issue and principles as in the eminent domain cases regarding the treatment of the remainder where part of the property is taken.

3) WMC's Constitutional Right Of Due Process Was Violated Because It Was Denied A Trial On The Issue Of The Remainder.

The lower court ruled, without a trial, that WMC was not entitled to recover damages for the Beltway tract. WMC objected that this was a violation of its constitutional right of due process and its right to have a trial by jury, which it had demanded.

B. PORTAMERICA WAS A UNIFIED PARCEL OF LAND.

This court held that WMC could not recover for damages on the Beltway because the ownership entity of the two parcels was different on the date of repudiation. This issue was never raised at the lower court. The denial of damages

for the remainder was on an entirely different basis. The FDIC never briefed this issue until this appeal.

WMC became the owner of the option on the Beltway tract in January 1993. The act of repudiation occurred later when the property was advertised in the 1993 RTC Winter/Spring catalogue, page 4, Waterview Management Company v. FDIC, 105 F.3d 696 (D.C. Cir. 1997). [1]

1) WMC Was A Successor In Interest To PortAmerica Associates

This lawsuit was filed in September 1994. WMC was the clear successor in interest to PortAmerica Associates. The Maryland case of Safer v. Perper, 569 F.2d 87 (1977), repeatedly cited by WMC in briefs, directly supports the applicability of this principle. The FDIC never challenged or disagreed with this fact of successorship. Even as late as the appellate brief, the FDIC at p. 9 acknowledged that WMC was the successor in interest. The court did not address this critical issue in its opinion.

2) There Was Unification of Ownership on July 2, 1992, Even Though There Were Different Entities

WMC could not find a case in the federal courts that addressed the precise issue. The state courts have dealt with this issue and are divided. New Jersey, in the case of Housing Auth. Of Newark v. Norfolk Realty, 364 A. 2nd 1052, allowed damages to the remainder for a corporation that was a different entity. This case recognized there may be "normal business considerations" for the different entities.

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[1] There is an issue as to whether the date of repudiation should be the theoretical date when the conservator was appointed under 12 U.S.C. §1821(e)(3)(A)(1), or the actual date of the repudiation under 12 U.S.C. §1821(e)(6) and the possible application of Office and Professional Emp. Int. v. FDIC, supra.

The North Carolina case of Board of Transp. v. Martin, 296 N.C. 20, 249 S.E.2d 390 (N.C. 1978), ruled that where the owning entities were different, the two parcels could not be treated as a unified tract, stating at 396: "where persons have deliberately adopted the corporate form to secure its advantages, they will not be allowed to disregard the existence of the corporate entity when it is to their benefit to do so."

The rationale of the Martin case distinguishes it from in the present case, however. In this case, WMC did not form its corporate entity to escape creditors. In fact, HomeFed bank required that WMC be formed as a corporation, FDIC brief, p. 36.

a). The Creditors Plan Proves Unification of Ownership.

WMC had prepared a creditors' plan, Exhibits 3A and B at trial, that has a material significance to the present issue. It was a plan based upon the entire development of PortAmerica, including both the riverfront tract and the Beltway tract. This plan provided for payment to creditors of both tracts of land, including the banks, prior to WMC's recovering any of its more than $50,000,000 invested capital. Thus, WMC was not trying to avoid creditors; it voluntarily provided for them in an extraordinary way. HomeFed Bank joined this creditors' plan as part of the Comprehensive Settlement Agreement.

3) Due Process Required A Hearing On This Issue of Unification.

It is submitted that perhaps there is not a division of states regarding this issue. Instead, the holdings turn of the facts of the particular case. Thus, the courts will not allow a party to reap the benefits where he has incorporated and then deny that corporation. But if there is a legitimate business reason for different entities, the courts will recognize that. Each case, in other words, turns on its own facts. That is why due process requires a hearing.

The present case presents an extreme example. Here, the bank required the corporate entity. As is evident from the creditors' plan, WMC was not trying to avoid creditors. The principals were all the same. There was only a brief time when the two tracts were not owned by the same entity. All these facts deserved to be heard by the jury who then would decide the issue. To add insult to injury, this court on appeal also ruled without a trial and, at that, on an entirely different basis that was not even raised in the lower court. WMC's right to due process clearly was violated in this case.

C. THE OPINION REFLECTS PATENT MISUNDERSTANDINGS REGARDING THE DEDUCTIONS FROM VALUE

1) Controlling Law.

The Supreme Court holds in Olson v. United States, supra, at page 257:

"Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment, of value - a thing to be condemned in business transactions as well as in a judicial ascertainment of truth" (emphasis added).

2) The Court's Patent Misunderstandings.

WMC is at a loss to understand how this court could so completely misunderstand its claim regarding the FDIC assumptions. The court's understanding at page 4, of WMC's claim as "allocating the costs of necessary improvements to both properties" is not the issue at all. This is perfectly normal. The costs already had been allocated and taken as an expense within the FDIC appraisal of $35,000,000 and the WMC appraisal of $36,000,000. The problem came after that when the FDIC made further deductions from that value.

The statement by the court at page 4 that "...the Beltway owner might have treated Waterview more favorably..." and this would "...require a determination of the extent to which the Beltway owner would have been willing to bear costs in excess of those a rational, self-interested owner would have borne" is just the reverse of WMC's position. WMC never expected the Beltway owner to bear any costs that weren't attributable to the Beltway tract. The problem is just the opposite: the FDIC deducted expenses that were attributable to the Beltway from the riverfront tract. Not even the FDIC has ever argued that the Beltway owner might have treated WMC more favorably.

The FDIC appraiser did not assume an "arms length transaction" (as the court said). She assumed that the owners would be so "uncooperative" that the riverfront tract owner would have to purchase the upper tract and spend nearly twice as much ($23,000,000) in order to develop the riverfront tract as was spent to purchase it ($12,000,000).

Assuming, arguendo, that the FDIC had assumed an "arms length transaction," this still is quite different from "common control" which was the undisputed fact of the case.

3) The Appraisal Method.

In order to analyze these deductions properly, it is essential to understand the method of appraisal. This appraisal was not done in the traditional way by comparing like properties. The method of appraisal used by both appraisers was first to project revenues out to the years when the lots would be sold. Then the costs of infrastructure and development were projected to the particular year when such costs would be incurred. The costs were then deducted from the revenues for each year to obtain a net cash flow for that year. This net cash flow then was discounted for each year back to the present date to get the present value, which is the same as appraised value. This method of discounting future cash flow defines what costs have been attributed to which part of the project and at what times.

4) The FDIC Deductions Were Based On Speculative and Conjectural Assumptions

The FDIC assumed that in order to develop the riverfront, it would need to purchase the upper tract and hold it for three years. Expenses in connection with this purchase price and with the costs of highway improvements allocated to the upper tract, such as interest at 12% for three years, then were deducted from the riverfront tract costs. The entire three years of interest deduction was taken in the first year. It was then assumed that at the end of the three year period, the owner of the riverfront tract would sell the upper tract for exactly the same price that was paid for it plus the capital costs of the "Beltway connector." Nothing was added to the sales price for the three years of interest to carry the upper tract, nor for the millions spent for the substantial improvements made to it, such as the Oxon Hill Road expenses. The reason is obvious. Any increment in the sales price would have to be credited against the deductions. The FDIC was not dealing in realities. They were motivated only according to what would be to their best advantage in this case.

The revenues on the Beltway tract would normally have absorbed such expenses, as the pro forma projections illustrate, but consideration of such revenues was disallowed by the lower court. Thus, the revenues on the Beltway tract were disallowed, but the costs on the Beltway tract were allowed as deductions from the riverfront tract. That is an unfair and inconsistent treatment.

Additionally, all the deductions for the construction of the highway system (erroneously called the "beltway connector" by the appraiser) were made in the first year. The fewer years costs are discounted, the higher they would be and the lower the appraisal. An extreme deduction from value occurs if costs are assumed to be in the first year, because in that case there would be no discount at all. The phasing plan, Trial Ex. 10, sheet #4, shows the highway system to be constructed in the fourth and fifth years in

sequence following the construction of the major office building. The FDIC appraiser's first year assumption defied logic, the facts, her own exhibits, and the law of the Olson case.

5) The FDIC Assumptions Violate Both FIRREA and Olson.

a) The Test To Determine Damages Under FIRREA Is Subjective.

The court erroneously states, at page 4 of its opinion, that WMC's view is too "subjective."

The FDIC says its appraisal is good "for anyone but the owner of the Beltway tract", tr. 350 (WMC does not believe it is good for anyone, anyway). Who does FIRREA protect if not the owner of the property that is taken by repudiation? When the cases decided under FIRREA hold that the intent of that law is to "make the party whole," to what party does that apply? Obviously the test is subjective to the party whose contract is repudiated. The FDIC's statement that its appraisal is good for anyone but the owner of the Beltway tract is contrary to FIRREA. Therefore the FDIC appraisal is invalid because it specifically does not apply to the owner, who is the very party that FIRREA seeks to protect. This specifically contradicts Olson which states at page 256, "And to the extent that probable demand by prospective purchasers . . . affect market value, it is to be taken into account." The owner of the Beltway tract would be the most probable purchaser and it was specifically excluded by the FDIC.

This issue of subjective interest has been decided by Olson. In that case the owner of property was denied compensation on the basis that the use of his land as a reservoir was not probable because of the limited amount of land that he owned, even though this was a possibility. This was entirely a subjective test applied by the United States Supreme Court as it looked to the circumstances of the owner of the property.

At pages 254-5, the Court held: "In any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government" and "no private property shall be appropriated to the public use unless a full and exact equivalent for it be returned to the owner."

b) The Assumption that the Owners of the Two Tracts Would Not Cooperate Is An Absurdity Because They Are The Same Principals.

With the premise that the subjective circumstances of the owner must be considered, the FDIC appraiser's assumptions that the owners would not cooperate, are contrary to the facts and clearly violate the requirements of Olson, supra. Even the FDIC appraiser admitted that her appraisal would not be valid if there were common control, tr 300. (It is not relevant to this issue of deduction whether the entities were or were not the same.) It should be noted also that this admission necessarily looks to the subjective circumstances of the seller.

The FDIC assumption of uncooperative owners also contradicts the cooperation specifically agreed in the Comprehensive Settlement Agreement, Trial Exhibit 4:

> "5.2. Joint Development Agreement...
>
> Borrower [PortAmerica Associates], WMC and Lender hereby agree to use good faith efforts to cooperate with each other to market the Beltway Property and the Property as one project." Emphasis Added.

This was a tri partite agreement. PortAmerica Associates, WMC and the bank (that the RTC took over) all agreed to cooperate with one another in the development and the marketing of the project as a whole. This agreement not only reflects the commitments made by these parties but also

reflects the cooperative state of mind of the owners of both the Beltway and riverfront tracts.

The Beltway owner thereby already had agreed to cooperate with the development and marketing of PortAmerica. Thus, an assumption that the Beltway owner would not cooperate is contrary to an agreement. The lender had agreed with WMC that there would be cooperation in the marketing of this property. The RTC assumed these obligations. Having agreed to cooperate, the RTC breached that term when it assumed that the owners would not cooperate.

6) The FDIC Assumption That The Parties Would Not Cooperate On The Same Project, And That The Other Tract Would Have To Be Purchased, In Any Case, Is Conjectural And Violates Olson

Assuming, arguendo, that the FDIC view that fair market value must be considered in the abstract, and that FIRREA does not permit subjective considerations, an assumption that the parties would not cooperate is erroneous as a matter of law. In the abstract, the parties would act in their own best interests and cooperate, as they did in the tri-partite agreement above. This is necessary for an integrated project where development of one part depends on the other. The probability is that they would cooperate because it is in their mutual best interests for the project to succeed, as Mr. Bunch testified at tr. 233-4.

The assumption, even in the abstract, that the Beltway owner would be so uncooperative that the riverfront tract owner would have to purchase the upper tract in order to develop the riverfront tract is highly conjectural. In the first place, the roads through the upper tract were dedicated so it would not even be necessary to purchase the Beltway tract to get access. Secondly, the idea that the owner of the upper tract would not let the owner of the riverfront tract improve his property by running a road through it is totally implausible.

Why wouldn't he? It would improve his property at no expense.

D. WMC IS ENTITLED TO DAMAGES FOR UNDISPUTED BREACH OF CONTRACT

1) The Breach That Aborted The Option Period Is Undisputed.

The court disallowed recovery for the loss of a two and a half year, interest free option price. The evidence is undisputed that WMC had a three-year interest free option to purchase the riverfront tract for $17,500,000.

2) The Appraisal Method Should Reviewed To Understand WMC's Damages.

The method of appraisal used by both appraisers in this case was discussed in Section C.3 of this Petition. It is obvious that the higher the rate of discount, the lower the appraised value will be. The FDIC expert used a discount rate of 12.8 %. The WMC appraiser, with appropriate factors reconciled, used virtually the same rate.

Therefore, there was significant expert testimony in the record as to the appropriate discount rate.

3) WMC Discount Of Option Was Commensurate With Discount Of Land Purchased

WMC believes that the fairest way to compute the damages is to discount this option price commensurate with the discount of the land values. After all, the option price was the purchase price for the land. This is not a difficult calculation, even when adjusting for the payments of $2,000,000 (please note that these were payments of principal that reduced the option price commensurately, not "bumps" that increased it). However, even if it were difficult, this should not be sufficient reason to deny the claim.

The principle of law is clear that: "While the proof of the fact of damages must be certain, proof of the amount can

be an estimate, uncertain or inexact," Office And Professional Emp. Intern. v. FDIC, supra.

Speculation that WMC could not have met the periodic $2,000,000 principal payments starting in eighteen months is not valid, relevant or true. The RTC repudiated the contract. As the breaching party, it is in no position to say that WMC could not have performed. It is axiomatic that: "...performance of a contract is excused, or may not be taken advantage of, when it is prevented by the acts of the opposite party ..." 17A C.J.S. Contracts § 468, pps. 640-641.

4) The Lower Court Denied The Claim, As A Matter Of Law, Thus Precluding Further Evidence.

The lower court erroneously denied this claim as a matter of law, noting and granting the exceptions taken by WMC, tr. 309. This ruling precluded the introduction of any further factual or expert evidence. If this court is not satisfied with the evidence in the record, this issue should be remanded for a determination of damages, as the FDIC suggested at page 41 of its brief to this Court.

Conclusion

WMC respectfully requests that this court grant a rehearing with recognition that WMC does not seek to recoup for losses incurred prior to the repudiation, but rather is acting in good faith and bases its claims upon the loss, more than two years later, of a viable project, ready for development with financing committed. The court is asked to grant WMC the opportunity to be heard on the critical issues of due process and successor in interest that the court did not address in its past opinion and to argue the issues of the FDIC speculative assumptions with a clearer explanation. This court is asked to reconsider the unity of ownership issues raised by this case and to correct errors of law relating to value and subjective consideration, particularly in view of the underlying statute. It is asked to provide relief for an

admitted breach of contract. It is asked to prevent a manifest injustice.

Respectfully submitted, this 18th day of June, 1999.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing Petition for Rehearing and Suggestion For Rehearing In Banc were served by first-class United States mail, postage prepaid, this 18th day of June, 1999, upon:

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_____

Rodney F. Page

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-7138

WATERVIEW MANAGEMENT COMPANY,
Appellant,
v.

FEDERAL DEPOSIT INSURANCE CORPORATION, et al.,
Appellee.

Monday, May 10, 1999
Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice,

BEFORE: Circuit Judges Silberman, Henderson and Garland

COURT OF APPEALS FOR THE D.C. CIRCUIT.

APPEARANCES:

James T. Lewis

Kathleen V. Gunning (FDIC)

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PROCEEDINGS

THE CLERK: Case No. 98-7138

Waterview Management Company, Appellant

v.

Federal Deposit Insurance Corporation, et al.

ORAL ARGUMENT OF James T. Lewis, Esq.

ON BEHALF OF APPELLANT

MR. LEWIS: Good morning, Your Honors. My name is James T. Lewis. I'm the attorney for the plaintiff, Waterview Management Company in this case. Sitting at the table with me is my co-counsel Rodney Page with Bryan Cave Law Firm, and my paralegal, Linda Polleck.

In this case arises --

THE COURT: Mr. Lewis, are you the same Mr. Lewis who was the witness in the case?

MR. LEWIS: Yes, sir. In principle, I should have mentioned that. I'm sorry.

THE COURT: I just wanted to know. That's all.

MR. LEWIS: Yes, sir, I am. I would like to reserve three minutes for rebuttal time, if we may.

The case arises out of a repudiation of a contract by the RTC of one part of a hugh real estate project in Prince George's County, which we call the River Front Tract. But left another tract of land, which we call the upper tract or the Beltway tract that was not directly taken by the RTC. There

are three areas of claim that were made in this case. The case is here strictly on the issue of damages in these three cases.

The first area of claim relates to whether we are entitled to recover for damages to the remainder of the PortAmerica Project, that is the upper tract as a result of the taking of the River Front tract.

The second area --

THE COURT: Who's we?

MR. LEWIS: The Waterview Management Company.

THE COURT: Well, isn't that a problem? You have different owners?

MR. LEWIS: Yes, sir. There are different owners at that snap shot in kind for July 2nd, 1992. But, the principals are the same.

THE COURT: But does that matter? I mean this is a corporate forum here. Right?

MR. LEWIS: It's a corporate forum --

THE COURT: And you want protection if, you know, from personal liability for the debt. So why should we not accord the same honor of the corporate forum?

MR. LEWIS: Well, there are a couple of answers to that, Your Honor. The first is that it was not our selection to make it a corporate forum. That was the bank, HomeFed Bank required us to do.

THE COURT: But it was the corporate -- you're not suggesting that this is a sham corporation. Are you?

MR. LEWIS: Absolutely not.

THE COURT: Right. So, shouldn't the other corporation come in and sue if it wants damages to it?

MR. LEWIS: Well, at the time that we filed the lawsuit, Waterview Management Company had also taken

over as a successor interest, the other part of the project. We made --

THE COURT: You didn't sue in that name.

THE COURT: You didn't. Right.

MR. LEWIS: We sued, at the time we sued, Your Honor, we sued in the name of Waterview Management Company.

THE COURT: You sued only in behalf of the Waterfront.

MR. LEWIS: I beg your pardon.

THE COURT: In behalf of it.

MR. LEWIS: I beg your pardon, sir. We sued for the damages done to the entire tract, the upper tract and the lower tract.

THE COURT: Right. But you didn't put in, if I understand correctly, and correct me if I'm wrong. You didn't put before the Court, the entire corporate apparatus. You are arguing for derivative damages on the basis of the principals are almost the same. I think there's a one percent difference. Right?

MR. LEWIS: There's a one percent difference between the owners --

THE COURT: No, no. You don't have to divert to that. That is your argument. It's this derivative argument. You want us to ignore the corporate forum. You didn't sue in the name of both corporations.

MR. LEWIS: Your Honor, our argument goes to both. At the time we sued, PortAmerica Associates had no interest in this project.

THE COURT: But nothing that belonged to PortAmerica Associates was repudiated. Right? The right here was something in the name of Waterfront Management. Right?

MR. LEWIS: Waterview Management, yes, sir.

THE COURT: Waterview Management. I'm sorry. I'm going to get that wrong a couple times, but. Right? Isn't that right?

MR. LEWIS: That's correct.

THE COURT: Okay. So, although I said maybe they should have sued, I'm not sure they could have sued, because nothing of there's was repudiated. At the time of the repudiation, the party who was repudiated was Waterview Management.

MR. LEWIS: That's correct.

THE COURT: Okay. So another party, even if it happens to be owned by the same company, wouldn't get any damages from that as long as it really is a separate company. Which I'm accepting that it is, and not a sham.

MR. LEWIS: It's certainly not a sham. And we wouldn't say that if that wasn't the case. The principals are the same. We were directed by the bank that the RTC took over. It had the sort of --

THE COURT: But you were directed, this was a consequence of a default. This isn't like something that they, you know, just directed you to do. They had some power over you other than the fact that you were in default.

MR. LEWIS: We were in default, but we reached a comprehensive settlement agreement with the bank.

THE COURT: And you accepted separate corporate forums.

MR. LEWIS: Yes, sir. And it was there that they asked for the separate forum. At the time, six months later, we made on the other tract of land, Waterview Management Company made the same arrangement that mirrored the arrangement we had with HomeFed Bank on the Riverfront. But the owners are the same. Waterview Management Company was the successor in interest on that parcel of land.

And at that time we filed suit, we filed in that capacity, as a successor interest to PortAmerica Associates.

THE COURT: So why do you think it was error to exclude the injury to the Beltway project?

MR. LEWIS: The reason we think --

THE COURT: Beltway portion --

MR. LEWIS: The reason we think that, Your Honor, is that PortAmerica was one whole integrated project. That's the way it was approved. That Prince George's County and various other authorities, it was a balanced project, a mix-use project of residential and office. The office was more or less on the upper tract on 95, the residential on Riverfront.

THE COURT: Why do you think the District Judge was in error?

MR. LEWIS: Because he, we did not have any kind of trial. We did not have any hearing --

THE COURT: No, but he made a judgment, did he not, about what the statute meant.

MR. LEWIS: He made a judgment that we were not entitled to recover for damages on what was the remainder of the whole. It's strictly analogous in our opinion to a condemnation case. Where the Government takes part of a whole and then the issue then becomes is there any damage done to the remainder. And I think the law is well settled.

THE COURT: Do you agree then, that you have to win the argument that it was one owner here in order to make that argument. Right? If there were two separate, if we were to say that at the time of the repudiation there were two separate corporations, you couldn't make that argument. Right?

MR. LEWIS: Well, let me make a comment on that. Going to your office and professional employees in a national case. As I understand the holding in that case, that case did address the events or the meaning of FIRREA, when the RTC

takes over as conservator. As I understand the case, what that case held is you look to that point in time to determine the value, the damages that would flow from it. But, you can look to other operative effects subsequent to that time. I think at that time the employees of the National Bank of Washington were under termination contract when the termination occurred, after the date of repudiation.

THE COURT: We didn't have a problem in that case of identity. Did we?

MR. LEWIS: Of two different owners?

THE COURT: Right.

MR. LEWIS: No, sir. You did not have that.

THE COURT: I thought the point on this issue was that lost profits or opportunities are things that arose after the time of the repudiation. And those are things that we can't consider. Because the statute specifically says that.

MR. LEWIS: Yes, sir.

THE COURT: So, you're making argument about something that happened after the time of the repudiation. Isn't that what you're doing now?

MR. LEWIS: Well, no, we claimed damages as of the date of the --

THE COURT: But you're saying based on events that occurred after the time of the repudiation.

MR. LEWIS: Well, the first position, there was exactly the same people that owned the two companies. But, six months later, the same company, Waterview Management Company came into ownership of the option.

THE COURT: Right. But isn't that exactly the point of that case. Which was we don't look at things that happened after -- I thought you had a separate, you have two arguments here, at least. One is that, the one that we've just been discussing. A second one is that even if they are separate, that

they did cooperate because of their joint principals. And this is separate argument on your part. Right?

MR. LEWIS: Yes, sir. There is common ownership, common control, common managers.

THE COURT: Now, why does that matter?

MR. LEWIS: I beg your pardon?

THE COURT: Why does that matter? In other words, what I understand the argument here is that the expert for the FDIC made a wrong assumption, shouldn't have assumed arms-length bargaining between the two, but instead should have assumed cooperation. And that that is wrong as a matter of law. Is that the argument?

MR. LEWIS: That's correct. That goes, Your Honor, that goes to the second question, perhaps rather than the first. Although it relates both ways. But, the second question, or the second issue in this case relates to the Riverfront and the assumptions that were made by the FDIC appraiser in holding that, in making the assumption that the owner of the upper tract was hostile or uncooperative with the owner of the lower tract. And there we do get into common ownership.

THE COURT: But they didn't say hostile. She just said --

MR. LEWIS: They said uncooperative.

THE COURT: But which she meant arms-length. She clarified in her argument that what that meant was, in her testimony that what she meant by that was the fact that they were hostile to each other. It just said they wouldn't cooperate any more than two other strangers would cooperate. If it was in their interest, they would. If it wasn't in their interest, they wouldn't.

MR. LEWIS: Well, Your Honor, I think she did clarify, back track whatever it was as the case went on. But, she maintained that they would be uncooperative enough that

in order to develop the Riverfront property, they would have to pay $23 million to obtain the --

THE COURT: Well, no --

THE COURT: But counsel, well the issue in the case is very simple. Isn't it? Do you measure damages based on an objective appraisal of the circumstances given these two parcels under separate ownership, or are you, as a matter of law, entitled to show a measure of cooperation that might not be objective?

MR. LEWIS: Your Honor, I think that, if I may, this is an issue that we've discussed quite a bit, of course. I think that there is a subjective matter that comes into play when you look at the seller of the property. I think the so-called hypothetical third purchaser, that we heard quite a bit about at the trial, the purchaser is objective. But I think the test is would a willing seller would sell and a willing, motivator buyer would purchase it first. So, I do think that to the extent that it is subjective when you look to the seller of the property. And I think that's in accordance with FIRREA. Because FIRREA states that you look to the party who is injured. The party whose contract was repudiated --

THE COURT: I'm having a little difficulty seeing why that's not speculative and therefore a lost opportunity. Let me put the issue to you and tell me what's wrong with it.

MR. LEWIS: All right.

THE COURT: It seems to me that if the Riverfront party under normal circumstances had to pay, say $100 for the Connector. But because of the cooperation, the other party, what are they calling, the other --

MR. LEWIS: Beltway owner?

THE COURT: Beltway.

THE COURT: The Beltway Parcel was willing to pay part of that. Well then they're acting in an uneconomic way, the Beltway party. And they are losing some money. And

why should we give them, in other words, they're taking it away from somewhere else. And this is speculative as to whether or not they will take away some other part of them. If they were all cooperating and owned by the same, the net would be the same. Unless you're saying there's some kind of efficiencies from them being together.

MR. LEWIS: No, sir. As I understand your question and remarks, I believe I agree with them. If the two owners were the same, if I understand the FDIC position, you don't get into this question of deductions. It's only when you have uncooperative owners that you get into it.

THE COURT: Well, no. Somebody still has to pay for the Beltway Connector. And that doesn't come free. Isn't that right? The question is how the costs are shared.

MR. LEWIS: If the Beltway owner is, if it's the same owner and the Beltway owner is carrying the property for three years, is putting in the roads or his share of the roads --

THE COURT: His share of the roads. He's not going to put in all the roads, even if he's cooperating.

MR. LEWIS: That's right.

THE COURT: So the real, all we're really disputing is whether they're going to put in more than their economic share of the road because they're cooperating. And I don't know, you know, this is sort of, it's like transfer pricing within a corporation. Why should we assume that the company is going to act internally that is between its two parcels in a way any different than third parties would act?

MR. LEWIS: Well, I really don't disagree with it. But I think that's a hole in the FDIC's argument. Why would you take $23 million worth of damages that are normally attributed to the Beltway Parcel? And when the Judge rules we can't recover revenues for the Beltway Parcel that would normally finance those --

THE COURT: Well, that's not, I understood the net effect here was that 65 percent of the cost went to you and 25, and 45, I guess percent, went to the, or maybe it was 55 and 45. I guess 55 and 45. Right?

MR. LEWIS: I think the FDIC argument was.

THE COURT: Right. 55 and 45 and then 45 went to the Beltway. And that was the net net. That is after the revenues that they would have gotten for the other. It doesn't strike me as an inappropriate, at least as so out of the ballpark that we consider that's legally inappropriate allocation of costs, even if they're cooperating with each other.

MR. LEWIS: But isn't it, when the Riverfront purchaser takes expenses that would be attributable to the Beltway and deducts those expense from the Riverfront part. That's what they've done here.

THE COURT: That's not the way I read that. Can you explain to me why I'm misreading it. I thought what happened was that they assumed the whole thing was purchased. And that there would be revenues from the whole thing being purchased. And then the consequence of which was that there was a carrying cost, but there was also only a 55 percent deduction for the cost of roads. Not the whole cost of the road, just 55 percent of it. If you read that other 45 percent was borne by the revenues of the Beltway Tract.

MR. LEWIS: No, sir. I think what they did, they didn't assume any revenue from the Beltway Tract. They took all these expenses that would be attributable to the Beltway Tract and they applied them as deductions on the Riverfront Tract. That's what our problem is with it, one of the problems.

THE COURT: Now, you, there was good cross examination on this point of the expert about her assumption of noncooperation. And you got her to concede, you know, that the analysis might be wrong. You didn't move to exclude her testimony. Did you?

MR. LEWIS: There was an element there where, it's on transcript 349 --

THE COURT: Right. I'm looking at your brief.

MR. LEWIS: Where the attorney for the FDIC went into this question of the FDIC appraiser and said is it proper for me to question you on this joint ownership question when in following the orders of the Court. The WMC attorney objected at that point, stating that did not fairly characterize the record. The Judge overruled the Waterview attorney, essentially holding that was a correct --

THE COURT: They should be treated as arms-length.

MR. LEWIS: So, it was treated, he went farther than that, Your Honor. What he said was that fair market value can fairly encompass uncooperative owners. Which I think is speculative at the best here. And number one, it follows that uncooperative owners would have to take these abnormal deductions under Riverfront that are properly attributable to the Beltway. So, and the jury --

THE COURT: Your time is running out, counsel. Did you have another point that you wish to make before you sit down?

MR. LEWIS: Yes, sir. I do. I want to comment on the option price matter where it was a three-year option, interest free. It was breached --

THE COURT: Why don't you sit down on that. You'll get a chance again. We're going to question the other side on that. You'll get a chance back on rebuttal.

MR. LEWIS: Okay. All right.

THE COURT: I think we have your price argument in the brief.

ORAL ARGUMENT OF KATHLEEN V. GUNNING, ESQ.

ON BEHALF OF APPELLEE FDIC

MS. GUNNING: Good morning, Your Honor. My name is Kathy Gunning, and I'm representing the FDIC. At counsel table with me is Jeff Bloom, who is trial counsel for the FDIC below.

I'd like to address three main points. The District Court properly found that the measure of damages was a difference between the fair market value of the Waterfront property and the option exercise price. And the District Court properly found that Waterview is not entitled to a discount on the $17.5 million cash exercise price. And the District Court properly excluded from measure of damages, those damages relating to the Beltway property.

Turning first to looking at the awards of the statute. The Court first looked at the words of the statute and applied a traditional measure of damages, which is market value less option price. That in regular contract damages in Maryland and throughout the country is considered actual damages. As part of the actual damages component, they looked at the market value. The employee retirement system says market value can be part of that actual direct compensatory damage formula.

The appropriate analysis in this case is what a third-party purchaser would pay. What a willing buyer and a willing seller would agree on in open market at arms-length transaction. The credit assumption was that there was no joint ownership, because that would be the only analysis where you would have a third-party purchaser. In the Olson case cited by appellants, market value was not considered based on the cost of the individual seller. And similarly, you would not consider the purported, better cost that this individual seller would have.

The option price, there was no right to a discount on the option price. The contract contained the option price as $17.5 million.

THE COURT: Well, I'm a little puzzled about that.

MS. GUNNING: Yes, Your Honor.

THE COURT: Actually, I'm puzzled by several aspects of that. If I have an option price for 20 years at $10 million, doesn't that option price increase in value to me as the years go on?

MS. GUNNING: Perhaps it would as the years go on. But what the Court told us, or the Congress told us rather, in 1821(e)(3) is that you have to focus on the day of the repudiation, excuse me --

THE COURT: Yes, but you can calculate a discount factor there as of that date. Can't you? There's a discount rate in effect in any day of the year.

MS. GUNNING: Yes, but in this -- you could, Your Honor. And, but --

THE COURT: In other words you can measure it right at that moment.

MS. GUNNING: Absolutely.

THE COURT: What the discount rate is.

MS. GUNNING: Yes, you could, Your Honor.

THE COURT: So, if I have a 20-year option at $10 million, one can figure out what that, the value of that option is over 20 years right on this date. Isn't that true?

MS. GUNNING: That's correct, Your Honor.

THE COURT: Okay.

THE COURT: I'm just not following that. When you say that that, the question -- let me just see if I understand what would happen here. In other words, they would come and they would say we're going to give you this option back early. Right? That would be the question. And therefore you might want it back early, because then you could then resell it to somebody. Right? That's why it's worth -

MS. GUNNING: Right.

THE COURT: So, doesn't it depend on whether the market's in the proverbial toilet on that day or not? Is there really some table you can look up to see whether this option is worth anything?

MS. GUNNING: No, it would have to be upon expert testimony.

THE COURT: Right. So it isn't just applying a discount rate to the present value of future money. The question is whether this option is worth anything to the FDIC at that point, which in turn depends on whether under current conditions it could do anything with the property. Is that right? Isn't that right? If they give you back the option but you can't sell this PortAmerica plan to anybody, it doesn't help you any. Or does it? I mean you don't get any advantage of it.

MS. GUNNING: That's correct, Your Honor.

THE COURT: So, you wouldn't have any reason to give them a discount.

MS. GUNNING: No, and moreover the contract doesn't allow you to give them a discount.

THE COURT: Well, it doesn't allow you. I mean there's nothing that would bar you if -- let's say if they came in and it turns out that day the market price, you know, was unbelievably high because there was a complete turnaround in the economy. You might be willing to offer them some more money to come in early and turn it in. They wouldn't be entitled to any money, but in order to encourage them, you would give them more. But that would depend on whether or not, where the market was on that day.

MS. GUNNING: Right. And it would be speculative.

THE COURT: It would be speculative.

THE COURT: So you didn't like your answer to my question, so you amended because of the intervention of my colleague.

MS. GUNNING: Absolutely, Your Honor.

THE COURT: Right. Well, but the problem with that is, he's certainly correct that he can talk about various speculative eventualities. But there is a time value of money calculation which is independent of that. Isn't that correct?

MS. GUNNING: You mean mechanically?

THE COURT: Yes.

MS. GUNNING: You put expert evidence --

THE COURT: No, there's a time value of --

MS. GUNNING: -- on and yes you could mechanically come out with a number.

THE COURT: Right.

MS. GUNNING: But the difference is --

THE COURT: It's true that circumstances may change, so that that option may or may not be exercised. But as of date A, if a 20-year option is worth more than a 10-year option without knowing what the circumstances are going to be in the 10 or 20 year period, right? If it's at the same value.

MS. GUNNING: Right.

THE COURT: That's right. So everybody knows that the option for 20 years is worth more than an option for 10 years at the same value because you have to, you just calculate the time value of money. And you can't take into account whatever circumstances will be in existence at that time which will make it advantageous or not advantageous to exercise the option.

MS. GUNNING: But the problem with that, Your --

THE COURT: Didn't we say that, isn't that pretty much the burden of our prior opinion in this case, in the

National Bank of Washington case? When we talked about severance pay options?

MS. GUNNING: Yes. You basically said that, but what you were doing is a present valuation of that contingent liability. But here --

THE COURT: Right.

THE COURT: But that's money that they were clearly enti-- they were going to get.

MS. GUNNING: That's correct.

THE COURT: And you could then just discount the money.

Here, they're --

THE COURT: No you couldn't. No you wouldn't. You weren't clearly entitled to that. It depended entirely on various factors as to whether you got a severance pay. But they were discount, there were factors that could be objectively calculated. Right? Because you might not, you wouldn't get a severance pay if you died, for instance.

MS. GUNNING: That's correct.

THE COURT: Right.

MS. GUNNING: No, there were items that you would look at. However the difference is that here, what you have is a lost opportunity. Because what they said is they didn't have the opportunity to use this money for other means. And so the date that was fixed was the date of July 6, '92.

THE COURT: Yes. But that's just a terminology. Isn't it? One thing I am confused about is that if they did exercise, as I see your argument, you point out that even if they're right, they're only right for 18 months. Is that correct?

MS. GUNNING: For one year. Because 6 months had expired --

THE COURT: Oh, yeah, excuse me.

MS. GUNNING: -- and you had another year.

THE COURT: So another year.

MS. GUNNING: And then you had, you had to pay $2 million. So you don't know if the option would be open.

THE COURT: Right. And that's where you get the speculativeness into it. Because you don't, nobody knows whether --

MS. GUNNING: If they could have come up with the money.

THE COURT: -- if you're worth $2 million at that point.

MS. GUNNING: That's correct.

THE COURT: So, even if they're right, your point is it's only for, your alternative argument is that it's only for a year.

MS. GUNNING: That's correct. And would have to be remanded for expert testimony on as you said, that there was a difference in the two.

THE COURT: Is there anything in the record that establishes that? That poor District Judge would like to get this back -- Is there anything that establishes what the-

MS. GUNNING: Whether or not they could come up with the $2 million?

THE COURT: No, no, no.

MS. GUNNING: No.

THE COURT: Let's assume arguendo you're right, he's right for one year. That he was entitled to the discounted value of that option for one year. Is there anything in the record that establishes what that is so that you can just calculate it?

MS. GUNNING: No, Your Honor. There's nothing you could tag on to. As a matter of fact, Judge Robertson said

to counsel I hope you're right on this because we'll have to come back down again, so.

THE COURT: Well, they hadn't put anything, the objection occurred --

MS. GUNNING: They did not put any evidence in.

THE COURT: -- at the time of the jury instructions. And they had not put in any expert testimony on the subject.

MS. GUNNING: That's correct.

THE COURT: Right?

MS. GUNNING: Right.

THE COURT: Mr. Lewis was the only person who testified. And that's what the Judge said.

MS. GUNNING: Right.

THE COURT: Also then, wait a minute then. Is your argument then that counsel didn't, even if he's right, he didn't meet his burden?

MS. GUNNING: Well, he preserved the argument --

THE COURT: You didn't make that argument. I'm sorry.

MS. GUNNING: I mean he preserved the objection. But he didn't put any evidence in that they --

THE COURT: Well here's, let me read you what the Judge ruled. And the question is whether we can affirm it on that ground alone. But this is a ruling of the Court.

MS. GUNNING: Right.

THE COURT: You can have the testimony on the discount is that of Mr. Lewis alone. I think the complications of sorting that out when the jury has no way of calculating what the discount would be. Particularly with the three $2 million bumps at 18 months, two years in two and a half years. And so forth, it just gets too complicated. I don't think

there is really any expert testimony on the point. That's what the Judge ruled.

MS. GUNNING: That's correct.

Finally, I'd like to turn to that Waterview cannot recover damages on the Beltway property. This case was just remanded for a determination of damages on the breach of the option contract on Waterview only. The Court applied the formula was market value less the option price. And Waterview did not suffer any damages because it did not own the Beltway on the day in question which was July 6th, 1992.

Your Honor, because the District Court properly found that the measure of actual direct compensatory damages included only the difference between the market value of the Waterfront property and the option price, because the Court did not use it's discretion admitting expert testimony, the FDIC requests that you affirm the decision below. Thank you.

THE COURT: Thank you.

ORAL ARGUMENT OF JAMES T. LEWIS, ESQ.

ON BEHALF OF APPELLANT -- REBUTTAL

THE COURT: Counsel, go ahead, you have -- Now, with respect, even assuming you're right conceptually, concerning the discounted value of the option, therefore reducing the settle of, you have two problems that have emerged here. One of which is it's certainly speculative to take it beyond the 18 months of the option, which is another, beyond a year, because at that point, you have to pay $2 million for each six months extension. And nobody knows whether you would have at that point. That really is lost opportunity, lost profits. Isn't it? That's the speculative area that the statute's designed to cut off.

MR. LEWIS: Your Honor, that was a very modest amount for what we were doing there. That --

THE COURT: But, as my colleague would say, if the project was in the toilet you would not have put $2 million more for anything.

MR. LEWIS: The project was not in the toilet.

THE COURT: No, but we're saying, if my aunt had --

MR. LEWIS: I see. I'm sorry.

THE COURT: Right. So in other words that, all right. So, I can't see how you can get beyond --

THE COURT: Well the project was in the toilet at some point. You defaulted.

MR. LEWIS: But we made arrangements with the bank to carry it on for three years options so we could pull it out.

THE COURT: I appreciate it. But I tell you the point was at the time that you defaulted, the project was in the toilet. Now, your hope was that in three years, somebody would use the plunger and it would be okay. To carry this

analogy beyond where it should be carried. But at some point, I mean, at the point that the deal fell apart, the deal fell apart.

MR. LEWIS: At the point, Your Honor, the project was repudiated by the RTC, I had a three year option to get that project --

THE COURT: We're diverting, we're diverting, counsel. We're diverting. I cannot see how we can possibly, I can't see how anybody could calculate what the value of that option is beyond the point where you have to, you would have to put in new money to keep it. Because nobody knows, that would be totally speculative as to whether somebody would want to continue the option beyond 18 months at a cost of $2 million. I mean, I don't even think there's much of an argument about it. But, now taking -- let's assume arguendo, you are entitled to a discount for the year. But counsel points out, with some prodding by the Judge here, that you never put any evidences on this point.

MR. LEWIS: Well, if I, if the Court will indulge me a little bit.

THE COURT: Certainly.

MR. LEWIS: On the first point. The reason we never got to the point of the $2 million is because the RTC repudiated it. So --

THE COURT: No, wait a minute. Put aside the $2 million. Just talk with me about the year.

MR. LEWIS: The one year?

THE COURT: Yes.

MR. LEWIS: To the 18 months. Well --

THE COURT: In other words, there is no evidence in the record that will allow us to establish even if you were conceptually correct, that you were entitled to a larger offset because of the discount value of that option over a year period. A year beyond the six months, you have held it.

There is no evidence in the record that allows us to do so. And the District Judge as Judge Garland just read, recognized that you hadn't put any evidence in on that point.

MR. LEWIS: I think it went more to the difficulty. What I intended to testify to is the discount for the option that would follow the discount that was applied to the land. There was plenty of evidence of that on there. And the appraisal, I mean the option price, after all, was just the purchase price for the property. If you discount the property, I would think you could discount the option price commiserately. That was the point I was making.

THE COURT: Well, you couldn't expect a jury to decide that out of, as if it came down from Mt. Sinai, if they had no evidence on this.

MR. LEWIS: But there was plenty of evidence on the discounts that were being applied. I don't know why –

THE COURT: I don't understand. If you were -- the discount would be the discount rate that would be applied.

MR. LEWIS: Yes, sir.

THE COURT: That's technical term.

MR. LEWIS: But it was a term commonly used at the trial for the value of the land.

THE COURT: The discount rate?

MR. LEWIS: Yes, sir.

THE COURT: The discount rate is an estimate of the inflation rate. That's all it is. Banks use it all the time. Was there any evidence on that?

MR. LEWIS: Yes, sir. Well, see, the way the property was appraised, Judge Silberman --

THE COURT: No, no. I'm not talking about the property. I'm talking about the discount rate on money.

MR. LEWIS: There was a discount rate applied to the value of land. That's how they appraised it.

THE COURT: I'm sorry, counsel. Are we having difficulty here? Your argument is the time value of money is worth something.

MR. LEWIS: That's correct.

THE COURT: That's got nothing to do with land. Right?

MR. LEWIS: Well, we thought it did. Because –

THE COURT: Because you had a contract for land. I know. But if you're trying to get the discounted, the present value of the discount for a year on the option price, you can't get that with respect to land anywhere. You can get that with respect to the value of money. No, yes.

MR. LEWIS: The option was a purchase price for the land. That's my argument. And I'm sure you understand it. If you don't agree with it, you don't agree with it.

THE COURT: But there is no evidence in the record. Is Judge Garland correct, and he read from Judge Robertson's statement that there is no evidence in the record to establish that you, what that figure would be, even if were right conceptually.

MR. LEWIS: Your Honor, it was quantified in a pro forma that was proffered to the Court.

THE COURT: Okay. So this is the pro forma that the Judge ruled out.

MR. LEWIS: The Judge ruled out.

THE COURT: And the Judge said, excuse me. The Judge said he was ruling out because at the deposition, the witness and the witness' lawyer were asked, is there going to be any written report? They were told no. And the Judge said, and now we have the pro forma, and the Judge says well, I'm not going to let it in. Isn't that right?

MR. LEWIS: The Judge wouldn't let the pro forma in I think because he thought it was prepared to late.

THE COURT: Right. After the deposition, it was prepared after the deposition. Right?

MR. LEWIS: It was prepared after the deposition, Your Honor. But it was on the exhibit list. And it had, we had to await information from the deposition to finish a pro forma because we were using --

THE COURT: I got it. And this is sort of the classic discretion question for the Court. Isn't it? That is whether to allow in a certain exhibit which the other side hasn't had a chance to have a deposition of, and isn't that? I mean --

MR. LEWIS: Yes, sir.

THE COURT: Unlike your other argument which is the wrong is a matter of law and we've got a de novo review. This one as to whether it was appropriate to rule out the pro forma would have to be an abuse of discretion.

MR. LEWIS: That would be an abuse of discretion. If I may make one more point and then I'll leave you.

THE COURT: Brief.

MR. LEWIS: Yes, sir. Aside from the technical ownership of the two tracts, the question was asked of the appraiser, if there was common ownership under common control, would your appraisal be valid? And she said it would not be. There clearly was common control, at least in this case. Thank you, Your Honors.

THE COURT: Thank you, counsel. Case is submitted.

CERTIFICATE

DEPOSITION SERVICES, INC., hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings before the United States Court of Appeals for the District of Columbia Circuit in the matter of:

Waterview Management Company, Appellant v.

Federal Deposit Insurance Corporation, et al.

Case No. 98-7138

By:

_____

Caroline G. Gibson, Transcriber

Transcript of Trial,
United States District Court for the District of Columbia
Mar. 24, 1998 (CA 94-1930)

[p. 300]

Q: Is it your testimony that you are unable to verify or say that the owner of the Beltway parcel on July 6 of 1992 was, in fact, Port America Associates?

A. I'm just saying I didn't verify it as July of 1992. I didn't do that. So I don't feel comfortable saying that I knew who was the owner at that time.

Q. Now, if, in fact, the owner -- let's say -- let me start over.

In doing a fair market value for the waterfront parcel, you are coming up with a value that a purchaser would pay on a given date and time, correct?

A. That's right.

Q. And the date is July 6, 1992, right?

A. That's right.

Q. If the purchaser was someone who either owned the Beltway parcel or was an entity under common control of the Beltway parcel, then that factor would be contrary to the assumption you made in your report; isn't that right?

A. I would say so, yes.

Q. In fact, it would, in effect, make your report a report that could not be relied upon with respect to that; isn't that right?

A. Well, the underlying assumption would be inappropriate in that circumstance.

Q. It would be wrong?

Transcript of Trial,
United States District Court for the District of Columbia
Mar. 24, 1998 (CA 94-1930)

[p. 301]

A. Yes.

Q. And are you testifying that you do not know, in fact, that the Beltway parcel was under common control with a holder with an option of this property on July 6 of 1992?

A. I did not know -- I did not know that. And one of the reasons why the assumption regarding cooperation/ownership between the Beltway parcel and the waterfront is highlighted in my report is, regardless of what the facts are, that no one would misunderstand this report.

So I can't testify as to what the facts are. I can testify as to what my conclusion, the assumption that my conclusion is based on, as far as the ownership goes.

Q. All right. But just to be clear, if that assumption is factually incorrect, then your report cannot be relied upon; isn't that right?

A. That's right.

Q. It is the case, is it not, that appraisers have some standards professionally with respect to instructions or limitations from a client?

A. I'm sorry. Is that a question?

Q. Yes, I'm sorry. Isn't it the case that there are standards that govern your profession with regard to instructions or limitations?

A. Yes.

Q In fact, it is improper, is it not, for an appraiser to

* * * * *

Transcript of Trial,
United States District Court for the District of Columbia
Mar. 24, 1998 (CA 94-1930)

[p. 349]

* * * * *

owners of the two properties are actively fighting with each other or disagreeing in some way?

A. No. It doesn't imply -- it implies nothing about personalities, in fact. It is purely a function of economic motivation.

Q. So I think you testified to this on cross, but just to make clear: Is your assumption throughout that the owner of each parcel here is going to act in his or her own best economic interests?

A. Yes.

Q. The assumption you used, which I gave to you in talking about no joint ownership here, in the guidelines and rules that Mr. Page was asking you about, is it- reasonable for you to rely upon a certain assumption given by a client if it is in direct response to a court ruling?

A. Absolutely.

Q. So if, in fact, --

MR. PAGE: I object, Your Honor. That's mischaracterizing the record of this case.

MR. BLOOM: Your Honor, I don't think so.

THE COURT: Overruled.

BY MR. BLOOM:

Q. So that was a yes?

A. Yes.

Q. For your assumption -- Mr. Page asked you if the

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-1930 (JR)

WATERVIEW MANAGEMENT COMPANY, *et al.*,

Plaintiffs,

v.

RESOLUTION TRUST CORPORATION,

Defendant.

FILED
OCT 27 1997
NANCY MEYERS – WHITTINGTON, CLERK
U.S. DISTRICT COURT

Following a hearing held in open court on October 6, 1997, and upon a review of the briefs of the parties regarding discovery, it is this 27th day of October 1997,

ORDERED that the trial of this cause will be to determine "actual direct compensatory damages" determined as of "the date of the appointment of the conservator or receiver." The "actual direct compensatory damages," if any, will be measured by the difference between the contract price and market value, and not by consequential or "foreseeable" damages. Accordingly, discovery of records from the HomeFed Bank, records of negotiations, copies of appraisals, etc., as proposed by the plaintiff, will not be allowed. At trial, plaintiff may adduce the testimony of both Bruce Gamble and of a MAI appraiser on the subject of property value. If plaintiff wishes to testify as to his own opinion of value, he may do so, but in that event he must of course withdraw from the representation and secure the entry of appearance of new counsel. It is

FURTHER ORDERED that the parties may have until January 9, 1998 to complete discovery of one another's valuation experts. And it is

FURTHER ORDERED that the final pretrial conference will be held on January 28, 1998 at 4:30 p.m. and the trial will commence on February 23, 1998 at 9:30 a.m.

/s/_____
JAMES ROBERTSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WATERVIEW MANAGEMENT COMPANY, et al.
Plaintiffs,
FEDERAL DEPOSIT INSURANCE CORPORATION
As successor to
RESOLUTION TRUST CORPORATION
In all of its capacities,
Defendant.

Case No. 94-1930
Judge James Robertson

MOTION TO CLARIFY, RECONSIDER AND/OR CERTIFY

Comes now Plaintiff and in the interests of orderly and expeditious discovery and trial, respectfully asks this Court to clarify and reconsider its Order of October 27, 1997, and specifically to clarify if this Order is intended to limit the damages which Plaintiff may recover.

A. Plaintiff is unaware of any precedent to support the total restriction of discovery as ordered by this Court of any of the files of HomeFed Bank. This bank was a party to the Comprehensive Settlement Agreement that the RTC repudiated, which is the subject of this litigation.

B. The ruling that "foreseeable damages" are not recoverable is not clear to Plaintiff as it seems inconsistent with briefs of both parties and to basic applicable law.

C. Plaintiff understands the concept of "consequential damages" but this term is nowhere to be found in any of the briefing of this case and Plaintiff is not aware of any case decided under FIRREA which refers to such damages (nor is this one of the exceptions stated in FIRREA).

D. The reference in the Order to the "contract price" within the context of the Order could be interpreted to mean that damages can be recovered for only the lower tract.

E. Plaintiff does understand and agrees that for damages to be recoverable they must be "direct compensatory damages."

F. The threshold issue is who decides what damages are direct and compensatory.

G. By the rulings above cited, the October 27, 1997 Order could be interpreted in either of two ways: (1) that this Court effectively has ruled that Plaintiff cannot recover for damages on the upper tract at PortAmerica and cannot recover for damages on the lower tract based upon it being part of the PortAmerica project; or (2) that Plaintiff can recover these damages if a jury decides that they are direct compensatory damages within the meaning and case interpretation of FIRREA. If the former, Plaintiff respectfully moves this Court to reconsider its ruling and permit the discovery and trial to proceed on the basis of the jury determining what are the direct compensatory damages.

H. Defendant recently has filed a Motion for Continuance wherein it states its understanding in Paragraph 1 thereof of the Court's October 27, 1997 Order as "establishing the issues to be determined . . . "

I. In any case, Plaintiff asks this Court to reconsider its ruling on the limitation of discovery and permit discovery that may lead to any fact that may be relevant.

J. Clarification of the Court's Order would be most helpful in further litigation proceedings.

K. If this Court has determined that Plaintiff cannot recover damages for the upper tract and/or for the lower tract based upon the PortAmerica plan, and such determination has and will influence this litigation, and if this Court will not reconsider such ruling, then the more feasible course of action to save everyone time and expense would be for this Court to

certify the following as controlling issues of law and permit Plaintiff to take an appeal at this time under 28 U.S.C. Section 1292(b):

1. Are "foreseeable damages" precluded as direct compensatory damages under FIRREA?
2. Where a jury trial has been demanded, does the Judge or the Jury decide what damages are direct and compensatory?
3. Is the restriction of discovery as contained in this Court's Order of October 27, 1997 consistent with the provision of the Federal Rules of Civil Procedure?

Respectfully submitted this 4th day of November, 1997.

_____

James T. Lewis

JAMES T. LEWIS, P.C.
1433 Dolley Madison Boulevard
McLean, Virginia 22101
(703) 847-9665

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing Motion to Clarify, Reconsider and/or Certify have been served by first class mail, postage prepaid, the 5th day of November, 1997, to the following:

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1667 K Street, N.W., Suite 700
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Alan L. Spear
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_____

James T. Lewis

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WATERVIEW MANAGEMENT COMPANY, et al.
Plaintiffs,
vi.

FEDERAL DEPOSIT INSURANCE CORPORATION
As successor to
RESOLUTION TRUST CORPORATION
In all of its capacities,
Defendant.

Case No. 94-1930
Judge James Robertson

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO CLARIFY, RECONSIDER AND/OR CERTIFY

1. Plaintiff simply does not understand the Order entered by this Court on October 27, 1997. The issues briefed by Plaintiff, as it believed the Court had requested, in connection with discovery, addressed the "foreseeability of damages" issue within the context of by whom should the damages have been foreseeable – the parties when they entered into the contract or the RTC when it repudiated.

2. Therefore, Plaintiff does not understand what this Court means when it says that "foreseeable damages" are not recoverable and then precludes any discovery at all from the HomeFed files. This would limit the Plaintiff's case severely. Plaintiff has seen no basis or authority for such a restriction in Defendant's briefs, or otherwise.

3. FRCVP Rule 26(2)(iii) provides that the balance must be weighed between the benefit of discovery by one party and the burdens to the other. The HomeFed files already have been shipped to Washington, D.C. There would

be minimal inconvenience to the Defendant. This information could lead to critically relevant material to Plaintiff in what it considers to be a most valid claim for $100,000,000. Defendant has not raised any objections to this discovery; to the contrary, Plaintiff and Defendant have exchanged appraisals and both documents show that the project must be considered as a whole.

4. One reason for the confusion is that the language in the Order does not follow any of the arguments or authorities in the briefs, so that Plaintiff has not had an opportunity to understand or respond to such issues. Defendant addressed "foreseeable damages" by citing the case of Kenford Co., Inc. v. County of Erie, 73 N.Y.2d 312, 537 N.E.2d 176, 540 N.Y.S.2d 1, Ct. App. (1989) which advocated the very factual information that this Court is now restricting, i.e., negotiations, and other facts which would define the foreseeability by the parties. Nowhere in briefs has the Defendant even mentioned "consequential damages." Plaintiff has not seen this term referred to in any of the cases addressing damages under FIRREA. FIRREA does not exclude "consequential damages" per se. In fact, there have been enormous consequential damages in connection with this matter, but Plaintiff has never claimed them. Plaintiff's claim has always been only for direct compensatory damages. Plaintiff understands and agrees with the FIRREA requirement of direct compensatory damages, and believes this is an issue for the jury to decide.

5. In addition to what Plaintiff perceives as years of abuse at the hands of a government bureaucracy, Plaintiff has suffered a long, difficult ordeal within the judiciary. The Complaint was filed over three years ago. The case already has gone up on appeal and had to be argued in the Circuit Court. The major issue was one that the RTC had strongly advocated. The Circuit Court held this law was so unfair as to be virtually unconstitutional.

6. The Court's restriction on discovery and foreseeable damages could be taken to mean that this Court already has

decided and so rules, effectively, in its October 27, 1997 Order, that Plaintiff cannot recover damages on the upper tract and/or that Plaintiff cannot recover for damages on the lower tract on the basis of that being part of the PortAmerica project. If so, and such decision has produced the restriction on discovery and will continue to determine the outcome of this trial on that basis, then the present proceedings realistically would appear to be a waste of everyone's time and expense.

7. A Motion for Continuance has just been received by Plaintiff. Paragraph 1 of that Motion refers to the Order of October 27, 1997 as "establishing the issues to be determined at trial." Thus, Defendant is interpreting the Order as a definition, and no doubt limitation, of such issues.

8. If that is the case, Plaintiff asks this Court to reconsider its Order and to (a) permit normal discovery; and (b) let a jury decide what are direct compensatory damages, including whether the upper tract was affected by the repudiation and whether the lower tract should be considered as part of PortAmerica.

9. The more feasible course of action would be for this Court to certify as controlling issues of law these issues described in the Motion and permit Plaintiff to take an appeal at this time under 28 U.S.C. Section 1292(b).

10. Otherwise, Plaintiff relies on the briefs on damages and discovery that it already has filed in this cause for points and authorities.

Respectfully submitted this 4th day of November, 1997.

_____

James T. Lewis

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing Motion to Clarify, Reconsider and/or Certify have been served by first class mail, postage prepaid, the 5th day of November, 1997, to the following:

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_____

James T. Lewis

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-1930 (JR)

WATERVIEW MANAGEMENT COMPANY, *et al.*,

Plaintiffs,

v.

RESOLUTION TRUST CORPORATION,

Defendant.

FILED
NOV 20 1997
Clerk

ORDER

The Court has reviewed plaintiff's motion to clarify, reconsider and/or certify this Court's order of October 27, 1997 [#36], together with defendant's opposition thereto and plaintiff's reply. The October 27 order clearly states that plaintiff's damages will be limited to the difference, if any, between the fair market value of the Riverfront Tract as of July 6, 1992 and the $15 million option exercise price. It is accordingly this 20th day of November 1997

ORDERED that the motion is denied.

/s/_____
JAMES ROBERTSON
United States District Judge

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Supreme Court, U.S.
FILED
FEB 3 2000
OFFICE OF THE CLERK

(2)

No. 99-677

In the Supreme Court of the United States

WATERVIEW MANAGEMENT COMPANY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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17pp

QUESTIONS PRESENTED

1. Whether the proceedings before the district court violated petitioner's right to due process and to a jury trial.

2. Whether the court of appeals erred in affirming the district court's calculation of the damages owed petitioner for the Federal Deposit Insurance Corporation's repudiation of petitioner's option to purchase one parcel of land, where that calculation excluded alleged damages to an adjacent parcel of land that petitioner did not own on the relevant date.

3. Whether alleged anomalies in the proceedings before the court of appeals warrant exercise of this Court's "supervisory power."

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The memorandum of the court of appeals (Pet. App. 3a-5a) is unpublished, but the decision is noted at 194 F.3d 175 (Table). The orders of the district court (Pet. App. 54a-55a, 64a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on May 20, 1999. A petition for rehearing was denied on July 22, 1999 (Pet. App. 6a). The petition for a writ of certiorari was filed on October 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of the repudiation by the Federal Deposit Insurance Corporation (FDIC)[1] of an agreement containing a purchase option, held by petitioner Waterview Management Company, relating to one of two separate parcels of property that were to be included in a proposed real estate development project know as PortAmerica. Pet. App. 3a.

One of the parcels, known as the Riverfront Tract, was owned by PortAmerica Associates, a Maryland partnership, and was subject to a first trust note held by HomeFed Bank, F.S.B. *Waterview Mgmt. Co.* v. *FDIC*, 105 F.3d 696, 698 (D.C. Cir. 1997). When the first trust loan went into default, a workout agreement among the parties permitted HomeFed Bank to take title to the Riverfront Tract through foreclosure, required the incorporation of petitioner, and granted petitioner a three-year option, subject to certain conditions, to purchase the Riverfront Tract for $17.5 million. *Ibid.* Petitioner and PortAmerica Associates had principals in common but were separate legal entities. Pet. App. 4a. The other parcel in the project, known as the Beltway Tract, was separately owned by PortAmerica Associates and was subject to a first trust note held by Signet Bank.

On July 6, 1992, the FDIC was appointed receiver for HomeFed Bank. *Waterview*, 105 F.3d at 698. Petitioner sued the FDIC after the FDIC advertised the Riverfront Tract for sale in its 1993 Winter/Spring Land Catalogue. *Ibid.* The district court dismissed the

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[1] Although the Resolution Trust Corporation (RTC) was deemed to have repudiated the agreement, the FDIC succeeded to the RTC's interest under 12 U.S.C. 1441a(m)(1). All references in this brief are to the FDIC.

action. The court of appeals reversed, holding that the FDIC had repudiated petitioner's purchase option on the Riverfront Tract when it advertised the tract for public sale. The court therefore remanded to the district court for a determination of whether petitioner was owed "actual direct compensatory damages" under 12 U.S.C. 1821(e)(3)(A)(i) for the FDIC's repudiation of the purchase option. *Waterview*, 105 F.3d at 702; see Pet. App. 3a-4a.

2. On remand, the district court determined that "actual direct compensatory damages" would be measured by the difference between the purchase option price and the fair market value of the Riverfront Tract as of the date of receivership, July 6, 1992. Pet. App. 54a, 64a. The district court conducted a jury trial to compute the damages owed to petitioner. *Id.* at 3a.

James T. Lewis, a principal of petitioner and PortAmerica Associates, testified that on the date of receivership, petitioner owned the option to purchase the Riverfront Tract, while PortAmerica Associates owned the Beltway Tract. In testimony concerning the fair market value of the Riverfront Tract, the FDIC appraisal expert valued the property as would an uninterested third party purchaser, assuming that the separate owners of the Riverfront Tract and Beltway Tract would cooperate with each other only if it was in each owner's individual economic interest. Pet. App. 4a, 53a. Petitioner did not object to the admission of the FDIC appraisal expert's testimony. At the conclusion of the trial, the jury found the fair market value of the Riverfront Tract to be $20 million. This figure was between the figures offered by the FDIC's appraisal expert ($12 million) and petitioner's expert ($36 million). Pet. 9-10. After deducting the $17.5 million option price, the district court entered judgment for

petitioner in the amount of $2.5 million, plus interest. Pet. 10.

3. The court of appeals affirmed in an unpublished memorandum. Pet. App. 1a-5a. The court held that petitioner was not entitled to recover damages for the loss of value to the Beltway Tract because petitioner "did not own that property at the time of repudiation—another company did."[2] *Id.* at 4a. Although the court recognized that petitioner and PortAmerica Associates had principal investors in common, it held that the entities were legally distinct and that petitioner could not recover damages for the loss of value to property it did not own. *Ibid.* Similarly, the court rejected petitioner's argument that the district court erred in "permitting the jury to determine the value of the Waterfront Tract as if its owner were unrelated to the owner of the Beltway Tract." *Ibid.* The court held that the FDIC appraisal expert properly assumed that, under a fair market value analysis, the owners of the two tracts would have dealt with each other at arm's length. *Ibid.*

ARGUMENT

Petitioner contends that the proceedings before the district court violated his rights under the Fifth and Seventh Amendments. Petitioner further argues that the court of appeals erred in affirming the district court's determination to exclude any alleged loss in value to the Beltway Tract when calculating the damages owed as a result of the FDIC's repudiation of petitioner's option to purchase the Riverfront Tract.

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[2] Although the court of appeals referred to the "time of repudiation," the context of the reference confirms (and petitioner agrees, Pet. 17) that the court meant to refer to—and based its decision on—the date receivership commenced.

Finally, petitioner contends that alleged anomalies in the proceedings before the court of appeals warrant the exercise of this Court's "supervisory power." Petitioner's claims are without merit, and warrant no further review.

1. Prior to the commencement of the jury trial in this case, the district court held that the damages petitioner was entitled to recover under 12 U.S.C. 1821(e)(3) would not include any alleged loss in value to the Beltway Tract. Pet. App. 54a-55a, 64a-65a. Petitioner contends (Pet. 12-13, 15-16) that the district court's ruling violated its rights to due process and a jury trial. That claim has no merit. Petitioner and the FDIC both submitted papers in the district court addressing the propriety of including alleged damages to the Beltway Tract. After reviewing those submissions, the district court held that under 12 U.S.C. 1821(e)(3), petitioner was entitled to recover only "actual direct compensatory damages" caused by the FDIC's repudiation of the purchase option, Pet. App. 54a (quoting 12 U.S.C. 1821(e)(3)(A)(i)), and that such damages would be confined to the Riverfront Tract. *Id.* at 64a. Petitioner then reasserted its arguments on this point in its motion for reconsideration, and the district court rejected them in denying the motion. Nothing in that procedure violated petitioner's Fifth Amendment right to due process.

Contrary to petitioner's assertions (Pet. 16), this case does not present a conflict with the Fifth Circuit's decision in *United States* v. *8.41 Acres of Land, More or Less, Situated in Orange County*, 680 F.2d 388 (1982). That case involved the calculation of constitutionally mandated just compensation for a taking by the government, not the determination of statutory repudiation

damages under 12 U.S.C. 1821(e)(3).[3] Moreover, *8.41 Acres* held only that "due process requires that the owners be given an opportunity to be heard on the issue of compensation." 60 F.2d at 395. In this case, the district court permitted petitioner to present arguments concerning the propriety of including damages to the Beltway Tract. Thus, petitioner was afforded an opportunity to be heard as required by *8.41 Acres*. Moreover, because the issue of whether 12 U.S.C. 1821(e)(3) permits the inclusion of losses in value to the Beltway Tract is a question of law, it was appropriately addressed by the district court and not by the jury. See *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 387 (1996) (noting that "it [is] for the court to 'lay down to the jury the law which should govern them'") (quoting *Tucker* v. *Spalding*, 80 U.S. 453, 455 (1871)).

2. a. Petitioner next contends (Pet. 17-22) that the district court's application of the traditional measure of damages for the breach of an option to purchase land—the difference between the option price for the Riverfront Tract and the fair market value of that tract—conflicts with this Court's decision in *Olson* v. *United States*, 292 U.S. 246 (1934). At bottom, petitioner's argument is that, because it hoped to develop the Riverfront and Beltway Tracts in tandem, *Olson* mandates that the district court should have ruled, as a matter of law, that the jury was precluded from determining the fair market value of the Riverfront Tract as if its owner were unrelated to the owner of the Beltway Tract. Petitioner is incorrect.

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[3] The decisions of this Court cited in *8.41 Acres* (*United States* v. *Reynolds*, 397 U.S. 14 (1970), and *Bragg* v. *Weaver*, 251 U.S. 57 (1919)) are equally inapplicable because they involve government takings.

Olson addressed the compensation owed to property owners after the United States condemned their land for use as a reservoir. The Court held that considerations of an individual owner's subjective expectations should be excluded from a determination of the property's fair market value, which it defined as the "amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy." *Olson*, 292 U.S. at 257. *Olson*'s description of fair market value is entirely consistent with the application of the concept in this case. Petitioner may have hoped to develop the Riverfront Tract together with the Beltway Tract, but the FDIC repudiated petitioner's purchase option only on the Riverfront Tract, and the district court properly permitted the jury to rely on an objective assessment of the Riverfront Tract's "market value" when determining petitioner's damages as a result of the repudiation. *Id.* at 255.[4]

In contrast, petitioner's "subjective" approach to fair market value is both unsupported and unworkable. As the court of appeals noted, "[t]o compute value on [petitioner's] theory would require a determination of

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[4] Petitioner's argument (Pet. 13-14) that the district court erred in finding that the statutory measure of damages does not include "consequential" damages is not appropriate for this Court's review, as the argument was neither raised nor decided in the court of appeals. See *Breininger* v. *Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 94 n.18 (1989); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981). Moreover, petitioner's claim of consequential damages flowing from the lost opportunity to develop the Riverfront and Beltway Tracts together is foreclosed by 12 U.S.C. 1821(e)(3)(B)(ii), which excludes "damages for lost profits or opportunity" from the "actual direct compensatory" damages that are payable under 12 U.S.C. 1821(e)(3)(A).

the extent to which the Beltway owner would have been willing to bear costs in excess of those a rational, self-interested owner would have borne. There was no basis for the jury to make such a determination other than speculation." Pet. App. 4a.

b. Petitioner also maintains (Pet. 24) that the court of appeals improperly affirmed on a basis not addressed by the district court, namely that PortAmerica owned the Beltway Tract on the date the receivership began, and that petitioner and PortAmerica are separate business entities. An appellate court, however, may affirm a lower court judgment on any ground supported by the law and the record. *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984); *Schweiker* v. *Hogan*, 457 U.S. 569, 585 n.24 (1982). Record evidence establishes that on July 6, 1992 (the date of the receivership), the option to purchase the Riverfront Tract was owned by petitioner (a Virginia corporation), while the fee simple interest in the Beltway Tract was held by PortAmerica (a Maryland partnership).[5] See C.A. App. 46, 169, 177. Petitioner cites no authority for the proposition that a claimant seeking "actual direct compensatory damages" pursuant to 12 U.S.C. 1821(e)(3)(A)(i) may receive payment for alleged damages to property the claimant does not own. Thus, the court of appeals correctly held that petitioner could not "assert a claim for damages to the Beltway Tract because it did not own that property"

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[5] Relying on a state takings case, petitioner contends (Pet. 17) that the court of appeals erred in finding that petitioner and PortAmerica Associates were separate entities. Petitioner identifies no conflict among the federal courts of appeals on the separate entity issue under 12 U.S.C. 1821(e)(3). The fact that some States may have developed differing state law approaches to the issue is not problematic, and certainly does not occasion this Court's review.

when the receivership of the Riverfront Tract began. Pet. App. 4a.

Petitioner maintains (Pet. 16-17), however, that the court of appeals erred in determining the ownership of the Beltway Tract on the date of receivership rather than on the later date of repudiation. Petitioner claims that it owned an option to purchase the Beltway Tract by the date of repudiation, and implies that it should be eligible for damages to the Beltway Tract as of that date. Petitioner is incorrect.

Assuming, arguendo, that petitioner did own an option to purchase the Beltway Tract by the time the FDIC repudiated the option to purchase the Riverfront Tract,[6] the court of appeals was correct to hold that alleged damages to the Beltway Tract were properly excluded. Under 12 U.S.C. 1821(e)(3)(A)(i), the receiver's liability for the repudiation of a purchase option contract is "determined as of * * * (I) the date of the appointment of the conservator or receiver." See *Office & Prof'l Employees Int'l Union* v. *FDIC*, 27 F.3d 598, 601-602 (D.C. Cir. 1994) (*OPEIU*) (holding that the FDIC's repudiation relates back to the date of receivership, and that repudiation damages are assessed with reference to the receivership date). Section 1821(e)(3) preserves the rights of property holders at the time of the receivership, and does not recognize the acquisition of new rights after that time. See *id.* at 604-605. Petitioner acquired a purchase option on the Beltway Tract after the receivership of the Riverfront Tract had begun, and was thus on notice that the FDIC had statutory authority to repudiate the purchase option on

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[6] Petitioner cites no record evidence establishing that it owned an option to purchase the Beltway Tract at the precise time its option to purchase the Riverfront Tract was repudiated.

the Riverfront Tract. Petitioner should not now be heard to contend that its own post-receivership actions increased the compensation it was owed for the repudiation of the purchase option on the Riverfront Tract. See *FDIC* v. *Liberty Nat'l Bank & Trust Co.*, 806 F.2d 961, 965 (10th Cir. 1986) (recognizing that insolvency statutes such as 12 U.S.C. 1821(e) seek to "prevent new rights from arising" after the date of insolvency).[7]

c. Petitioner focuses much of its argument (Pet. 19-22) on alleged infirmities in the methods used by the FDIC's expert witness to determine the fair market value of the Riverfront Tract. Petitioner's argument is misdirected.

It was the task of the district court, as "gatekeeper" in evidentiary matters concerning expert testimony, to determine the admissibility of the testimony of the FDIC's appraisal expert. See *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 147 (1999); *Daubert* v. *Merrill Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). If petitioner believed that some of that testimony should have been excluded, it should have raised those objections to the district court. Having failed to make such an objection, petitioner has waived any argument that the testimony was improperly admitted because based on

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[7] We note that this case does not involve a repudiation of the purchase option on the Beltway Tract. If the grantor of the purchase option on the Beltway Tract had gone into receivership before petitioner acquired the Beltway purchase option from PortAmerica, and if the FDIC later repudiated that purchase option, then an issue might arise as to whether an entity that acquires a purchase option to property after the date of receivership also acquires the right to damages under 12 U.S.C. 1821(e)(3) in the event of repudiation. This case, however, does not present that question.

"speculative and conjectural assumptions." Pet. 20-22. See Fed. R. Evid. 103(a)(1); *Willoughby* v. *Potomac Elec. Power Co.*, 100 F.3d 999, 1002 (D.C. Cir. 1996), cert. denied, 520 U.S. 1197 (1997); *Anderson* v. *Group Hospitalization, Inc.*, 820 F.2d 465, 469-470 (D.C. Cir. 1987); *Passaic Daily News* v. *NLRB*, 736 F.2d 1543, 1554 n.15 (D.C. Cir. 1984).[8]

Moreover, petitioner concedes (Pet. 10) that it was permitted to introduce its own expert testimony regarding the fair market value of the Riverfront Tract. The jury therefore heard expert testimony on the issue from both sides. It was the jury's task to evaluate the relative persuasiveness of the different experts' testimony and to arrive at a judgment as to the property's fair market value. The jury arrived at such a judgment, assessing the fair market value of the Riverfront Tract to be between the appraisals of the FDIC's expert and petitioner's expert. See Pet. 9-10.

3. Finally, petitioner asks this Court to grant certiorari in order to exercise its supervisory authority under Supreme Court Rule 10(a), contending that the court of appeals failed to address all issues raised by petitioner, demonstrated prejudice against petitioner in its remarks at oral argument, and committed factual errors in rendering its decision. Pet. 22-25. None of those assertions has merit.

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[8] In any event, the methods of the FDIC expert were unproblematic. The expert determined the general fair market value of the property, on the assumption that there was no relationship between the owner of the Beltway Tract and the owner of the Riverfront Tract and that the owners of each tract would cooperate with each other only to the extent it was in each owner's individual economic interest to do so. Petitioner identifies no decision of any court establishing that 12 U.S.C. 1821(e)(3)(A)(i) requires some other method of appraisal.

First, this Court grants the courts of appeals "wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances." *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972). Cf. Fed. R. App. P. 36(a)(2) (recognizing that courts of appeals may render decisions without publishing an opinion). Second, the statement by one of the court of appeals judges during oral argument that the project had gone "in the toilet" (Pet. App. 45a-46a) was merely a colloquial reference to the admitted fact that the note on the Riverfront Tract was in default at the time the parties entered into the workout agreement. It does not establish prejudice on the part of the court of appeals. Third, any factual error made by the court of appeals concerning the provision in the purchase option agreement that petitioner could extend the option by making $2 million payments had no impact on the outcome of the case. The court of appeals upheld the district court's refusal of a jury instruction regarding the discounting of the option price because petitioner had not offered any evidence regarding the value of the asserted discount. *Id.* at 5a.[9]

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[9] Because the court of appeals based its decision on this point on the lack of any evidence regarding the amount of the discount rather than the uncertainty of the amount (see Pet. App. 5a), petitioner's assertion (Pet. 25) of a conflict with the D.C. Circuit's decision in *OPEIU* is incorrect. See *OPEIU*, 27 F.3d at 602. Moreover, even if there were a conflict with *OPEIU*, such intra-circuit conflicts are best resolved by the court of appeals concerned and generally do not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2000

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(3)

No. 99- 677

IN THE

Supreme Court of the United States

Waterview Management Company,
Petitioner,

v.

Federal Deposit Insurance Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITIONER WATERVIEW MANAGEMENT COMPANY'S REPLY TO FEDERAL DEPOSIT INSURANCE CORPORATION'S BRIEF IN OPPOSITION

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PETITIONER WATERVIEW MANAGEMENT COMPANY'S REPLY TO FEDERAL DEPOSIT INSURANCE CORPORATION'S BRIEF IN OPPOSITION

ISSUES

1. Are the rights of Appellant, hereafter WMC, to due process and trial by jury violated when: (a) it does not receive a hearing by the trier of fact as to unity of ownership, as the 5th Circuit held in the case of *United States v. 8.41 Acres of Land, Situated in Orange County, State of Texas,* 680 F.2d 388 (5th Cir. 1982); (b) the Appeals Court affirms, without remand as required in *Massachusetts Mutual Life Ins. Co. v. Lugwig*, 426 U.S. 479 (1975), on a new basis that was not even at issue in the lower court; (c) a determinative issue, such as successor in interest, that has been argued repeatedly with supporting authorities by WMC, simply is ignored; and (d) a distinction is made by Defendant, hereafter FDIC, for a lesser remedy where property is taken by the government pursuant to an act of Congress, than where property is taken by the government pursuant to the U.S. Constitution?

2. Are assumptions for an appraisal of value valid when the subjective facts and circumstances of the property owner, whose property is taken, expressly are not considered, in violation of *Olson v. United States*, 292 U.S. 246; but instead, such assumptions are based upon hypothetical facts that are inapposite to those of the case?

3. Should this Court review judicial proceedings that tolerate and engender repeated violations of Constitutional rights as in this case?

I. FACTS

The material facts are not in dispute with two important exceptions.

A. The FDIC brief repeatedly states that "some of the principals" of the two entities – WMC and PortAmerica Associates - were the same. In fact, *all* of the principals were the same in both entities.

B. Facts regarding the allocation of deductions between the Beltway tract and the riverfront tract continue to be misrepresented by the FDIC. WMC already had allocated the costs and revenues between these two tracts in its pro formas for the development for the project. This had been done years before the litigation. However, for purposes of this litigation the attorney for the FDIC directed the appraiser to assume the parties would not be cooperative. On that basis, the appraiser arbitrarily charged expenses that already had been allocated to the Beltway tract to be charged, instead, against the riverfront tract. It is manifestly unfair and inconsistent to allow deduction, from the appraised value of the riverfront tract, of expenses allocated to the Beltway tract while not allowing the revenues from the Beltway tract which would have absorbed them.

The issues, other than the above mistakes of fact, involve the erroneous interpretation of law and its application to the facts of this case.

II. ARGUMENT

A. WMC should be allowed to recover for damages to the Beltway tract

1. As to due process issues:

The FDIC states at pages 5 and 6 of its Brief in Opposition that the holding in this case by the Court of Appeals for District of Columbia Circuit was not in conflict with the 5th Circuit case of *United States v. 8.41 Acres of Land*, *supra*, which held that due process required a hearing on the issue of unity of ownership. The FDIC argues that

WMC did have a hearing when the district court judge ruled that WMC was not entitled to recover for damages to the Beltway tract and therefore was not entitled to a jury trial on the amount of these damages. The FDIC sums up its argument at page 6 by asserting that this issue of unity of ownership is "a question of law" and that WMC had received the hearing that the 5th Circuit had contemplated when it held that due process required a hearing. This was clearly erroneous. The FDIC needed only to look as far as the headnote 4 at 680 F.2d, p. 389:

> When applicable, issue of unity or separateness of tracts separated by condemnation is a question of fact to be presented to the *trier of fact* (emphasis added).

The significance of this law is recited in headnote 19 at p. 390:

> In exercise of power of eminent domain, due process requires that owners be given an opportunity to be heard on issue of compensation.

The present case is not one of eminent domain. But the principles to be applied should be the same. The issue with the Beltway tract is that of damage to the remainder after a part of the whole has been taken. The FDIC brief at page 5, however, further seeks to distinguish *United States v. 8.41 Acres of Land, supra*, on the following basis: "That case involved the calculation of constitutionally mandated just compensation for a taking by the government, not the determination of statutory repudiation damages under 12 U.S.C. 1821(e)(8)." This statutory construction is manifestly erroneous. Among many other authorities, the District of Columbia Circuit Court found in the first WMC case, *Waterview Management Company v. Resolution Trust Corporation*, 105 F 3rd 696, 701 (D.C. Cir.1997), that failure to compensate for losses caused by the repudiation of the option would be tantamount to a taking and that "... statutes should be construed to avoid a possible unconstitutional

result." There was nothing in that decision that limited the recovery of damages to just the riverfront tract.

The FDIC simply ignores, as the Court of Appeals had done, the admitted fact that WMC was a successor in interest to PortAmerica Associates[1], with options on both tracts at the time of repudiation, and when the suit was filed in September, 1994. That succession of interest should have resolved this issue of "different entities." The RTC had recognized this fact at the District Court, which explains why the different entities argument was not even an issue in the lower court.[2]

The FDIC seeks to justify the action of the Court of Appeals in completely changing the basis of the holding below - while not even addressing the rationale of the lower court - by erroneously interpreting the two cited cases of *Thigpen v. Roberts*, 468 U.S. 27 (1984) and *Schweiker v. Hogan*, 457 U.S.569 (1982). These cases do not hold that "an appellate court, however, may affirm a lower court judgment on any ground supported by the law and the record." The law is expressed comprehensively in *Massachusetts Mutual Life Ins. Co. v. Ludwig*, 426 U.S. 479 (1975) which states.

> The Court of Appeals' decision on this issue is plainly at odds with the "inveterate and certain" rule, *Morley Co.* v. *Maryland Cas. Co.*, 300 U. S. 185, 191 (1937), of *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435 (1924), where a unanimous Court said:

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[1] FDIC appellate reply brief in first *Waterview* appeal stated: "Waterview has acted on behalf of PortAmerica Associates in their negotiations with the RTC and, for all practical purposes, represents the *de facto* appellant in this case." FDIC appellate reply brief, p. 9 acknowledges: "PortAmerica was to be developed by WMC's predecessor in interest, PortAmerica Associates..."

[2] FDIC responsive brief at the Distrct Court, p. 9, acknowledged: "Waterview had an option on the Beltway Tract with Signet Bank of Maryland as well as the option pursuant to the HomeFed Agreement..."

> "It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." (Footnote omitted.)

The argument of the insurer before the Court of Appeals that Illinois, not Michigan, substantive law applied was no more than "an attack upon the reasoning of the lower court," and as such required no cross-appeal.

Because the Court of Appeals did "not reach the issue nor express any opinion on the effect of the tort claim conflicts of law doctrine" of Illinois, 524 F. 2d, at 379 n. 1, we think it "appropriate to remand the case rather than deal with the merits of that question in this Court." *Dandridge* v. *Williams,* 397 U. S. 471, 476 n. 6 (1970). Accordingly, the petition for writ of certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings in conformity with this opinion.

As in *Mass. Mutual,* this case should have been remanded to the district court for determination of the issue of unity of ownership because the lower court "... did not reach the issue nor express any opinion ..." on that issue. One way or the other, WMC is entitled to a hearing on this issue.

2. As to the timing of the repudiation:

The July 6, 1992 date was purely fictional as the date of repudiation. The Circuit Court found in its first *Waterview* case, *supra,* that the act of repudiation was the breach of the exclusive marketing agreement in the 1993 winter/spring catalog. By that time, WMC also held the option on the Beltway tract.

The FDIC argues at page 9 that even if the act of repudiation occurred after WMC acquired the option on the Beltway tract, WMC nevertheless should have been on notice that the RTC could repudiate later and such repudiation would relate back Such spurious reasoning cannot be the law; if that were so, virtually all business by a company which had contracts with that institution would have to stop for fear that the RTC relation back feature could obliterate any business events after the theoretical date when the receiver was appointed. That ludicrous result is the very reason why the actual - not the theoretical – date should apply.

The FDIC erroneously interprets the case of *Office and Professional Employees Int'l Union v. F.D.I.C.*, 27 F.3d 598 (D.C. Cir. 1994) when it relates the time of the repudiation back to the date when the RTC Conservator was appointed, under 12 U.S.C.1821(e)(3)(A)(i). In that case, bank employees were allowed to recover severance pay even though the contract had not been repudiated as of the date of severance. The Circuit Court held at page 602 that "such questions, however, deal not with *whether* appellants have a claim, but rather with *how much* the claim is worth..." Thus, in this case the date of the appointment of the conservator should not determine whether WMC has a claim, but rather how much that claim is worth. WMC held the option on the

Beltway tract at the time of the date of the repudiation so that the entities were at that time exactly the same (WMC did *price* its claims as of the date of the appointment of the conservator).

B. The deduction issues

The FDIC argument, at pages 7 and 8 of its brief, that *Olson v. United States*, *supra*, holds that the test for assumptions in real estate values must be *objective* is just the opposite of what that case holds. This Court applied *subjective* tests in arriving at its decision in *Olson.* It found that it was *possible* that Mr. Olson could have used his land, that was taken, for a reservoir but not *probable*, and then found that mere possibility would not justify compensation for loss of a reservoir. If, however, Olson had owned a sufficient amount of the land to establish the *probability* of its claimed use, then the Court would have found that he could have been compensated for the loss of that use. *Olson* was the classic case of a subjective determination. If the same subjective test is properly applied in the present case, WMC would, prevail, as, subjectively, since the principals of the two entities were the same. It is an absurdity to assume that someone would not cooperate with himself.

Insofar as the FDIC argument that the jury considered both appraisals, the judge in the lower court - in the presence of the jury - overruled an objection by WMC's attorney, thus confirming the FDIC's assertion – in the presence of the jury – that the assumption of uncooperative parties was in response to a direct court ruling.

III. CONCLUSION

A. WMC is entitled to recover for the damages on the Beltway tract.

The threshold issues are those of due process and rights to a trial by jury:

1) The 5th Circuit in the case of *United States v. 8.41 Acres of Land*, *supra*, clearly holds that due process does require a hearing as to unification of ownership by the *trier of fact*, not a hearing of law that may be decided by the court;

2) The Court of Appeals erred when it affirmed on a basis that was never addressed in the lower court and this new issue should remanded for trial;

3) The FDIC brief errs in its argument that a party is entitled only to some lesser remedy when its property is taken pursuant to an Act of Congress rather than pursuant to the U.S. Constitution.

The Court of Appeals nevertheless found that WMC was not entitled to recover damages on the Beltway tract on the basis that different entities owned the two tracts. In order to decide this issue without a hearing, the following errors were committed in addition to the due process errors above:

1) the FDIC brief erroneously states that "some of the principals were the same." The fact is that *all* the principals were the same in these two entities;

2) a fictional date that the contract was repudiated was applied on the basis of an erroneous interpretation of FIRREA instead of the actual date of the repudiation when WMC had the option to purchase both tracts; and

3) the Court of Appeals, and now the FDIC brief, simply ignored the facts, admitted in the FDIC briefs, that at the time the Complaint was filed WMC was the successor in interest to PortAmerica Associates.

B. The deductions from appraised value are based upon an erroneous assumption and should not be allowed.

The appraisal issue raises the broad principal as to whether the proper assumption for determining property value is to be subjective or objective. Under a "subjective" assumption, it is necessary to consider the circumstances of the property owner whose property is being taken; it is

irrelevant whether through eminent domain or through the repudiation of a contract. With an "objective" assumption, as in the FDIC formula, considerations relate to a hypothetical seller and buyer without regard to the particular circumstances of the actual owner. The Court of Appeals said WMC's standard was "too subjective." WMC does not understand how a matter of degree enters the equation. WMC's position is that the test must be subjective:

1) The intent of the underlying statute - FIRREA - is to "make the party whole" whose property has been taken;

2) The case law, as discussed in *Olson*, *supra* clearly requires a subjective test;

3) There was a term in the Comprehensive Settlement Agreement that expressly required the parties, i.e. WMC, PortAmerica Associates and HomeFed bank to cooperate in the development of the property. Therefore, it must be assumed that the parties would cooperate, as agreed, and thus the assumption supporting the FDIC deductions from appraisal were not valid. If the RTC's repudiation is considered to have abrogated that term as of the fictional date when the conservator was appointed, then it is the RTC who should bear the responsibility for the alleged "non cooperation" instead of charging it to WMC through a contradictory assumption.

It follows that if a subjective test is appropriate, then it is an absurdity to say that the owner of the Beltway tract would not cooperate with the owner of the riverfront tract. The principals were all the same.

C. The FDIC brief perpetuates the lack of fairness in these judicial proceedings and is inconsistent with fundamental rights.

The FDIC response unfortunately is a perpetuation of the unjust treatment that WMC has suffered through the judicial process. The cases are not analyzed accurately and results are reached that are inconsistent with principles that have been

established for years by this Court. If the rationale as advocated by the FDIC were adopted, it would have a material and detrimental effect on all cases where the government has taken part of the whole, without regard to the property owner's damages to the remainder. Such an unjust result has been reached through a judicial process that has not given this case fair and thorough consideration, but rather has dismissed fundamental Constitutional issues of due process and trial by jury with a brief memorandum opinion, with no authorities, and which determines the outcome on a basis not even raised in the lower court. Finally, the issue of successor in interest, which should determine the issue favorably to WMC, simply was ignored at the Court of Appeals level and by the FDIC in its response.

The Petition for a writ of certiorari should be granted.

Respectfully submitted.

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